Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVE J. ABRAHAM, Personal Representative of the Estate of Roseline Abraham, et al.,

Petitioners,

v.

PWG PARTNERSHIP, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

PETITION FOR A WRIT OF CERTIORARI

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156 pp

QUESTIONS FOR REVIEW

1. Whether a state court has jurisdiction, or power, to divest the United States of its title to oil in place under federal lands and vest the title in a trespasser?

2. Whether a state court has jurisdiction, or power, to determine that a trespasser has exclusive possession of oil in place under federal lands to the ouster of a Unit Operator and a lessee of a federal oil and gas lease covering the oil?

3. Whether the errors of the New Mexico state courts in this case are so unfair as to arbitrarily deprive Roseline Abraham of her property rights in violation of her right to due process under the Fourteenth Amendment to the Constitution of the United States?

LIST OF PARTIES

A. Petitioners:

1. Steve J. Abraham as Personal Representative of the Estate of Roseline Abraham, Deceased;

2. Michael C. Abraham,

3. Steve J. Abraham, and

4. Diane Abraham Hinkle, surviving children of Mike and Roseline Abraham.

B. Respondents:

1. PWG Partnership, a New Mexico partnership composed of Frank D. Gorham of Albuquerque, New Mexico, and William G. Webb of Dallas, Texas;

2. Prudential Bache Production, Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production Partnership IIP-11, Prudential-Bache Energy Income Production Partnership IIP-12, Prudential-Bache Energy Income Production Partnership IIP-13, Prudential-Bache Energy Income Production Partnership IIP-14, Prudential-Bache Energy Income Production Partnership IIP-15, Prudential-Bache Energy Income Production Partnership IIP-16, Prudential-Bache Energy

Income Production Partnership IIP-17, and Graham Royalty, Ltd., Petitioners have no inkling of the makeup of this group;

3. El Paso Natural Gas Company, a Delaware corporation, a Plaintiff who filed this case; at that time a wholly owned subsidiary of Burlington Industries and perhaps Burlington Railroad;

4. El Paso Production Company, a Plaintiff; at the time - a wholly owned subsidiary of El Paso Natural Gas Company; and

5. Meridian Oil Inc., an intervenor in the case - at the time a wholly owned subsidiary of Burlington Industries, Inc. Meridian was an affiliate of El Paso Natural and El Paso Production. Meridian eventually took total charge of running the operation of oil and gas leases formerly owned by El Paso Natural and/or El Paso Production.

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v.

PWG PARTNERSHIP, et al,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

Petitioners, Steve J. Abraham, Personal Representative of the Estate of Roseline Abraham, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Mexico filed on December 1, 1993.

OPINIONS BELOW

The majority opinion for the Supreme Court of New Mexico written by C. J. Ransom, joined by J. Baca and J. Frost, is reported at 866 P 2d 311 (entitled El Paso Production Co., et al v. PWG Partnership, et al) and is reprinted in the Appendix ("App.") accompanying this petition at pages A1-48. A dissenting opinion was filed by J. Franchini (A48-57).

Petitioners' Motion for Rehearing was denied on January 3, 1994 and is reprinted at App. B1-3.

The trial court signed a Stipulated Final Judgment on Accounting Phase on September 18, 1991 (reprinted in App. C1-7) shortly after signing of the Judgment on Ownership Phase on September 18, 1991, (reprinted in App. D1-14).

The trial court filed a Decision (containing Findings of Fact and Conclusions of Law) on August 20, 1991 (pertinent excerpts are reprinted in App. E1-6).

JURISDICTION

1. Date of the entry of judgment sought to be reviewed - December 1, 1993;
2. Date of Order Denying Petitioners' Motion for Rehearing - January 3, 1994;
3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, and pursuant to the Property and Supremacy Clauses, and the due process clause in the Fourteenth Amendment to the Constitution of the United States.

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

A. U.S. Constitutional Provisions:

1. Art. IV. § 3, Cl. 2 (The Property Clause):

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States . . ."

2. Art. VI, § 2:

> "The Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby . . ."

3. The Fourteenth Amendment to the Constitution:

> Article XIV, § 1: ". . . nor shall any state deprive any person of . . . property, without due process of law; . . ."

B. Statutes:

1. 30 U.S.C. § 181 (The Mineral Leasing Act of 1920, as amended): (App. F1)

2. 30 U.S.C. § 189 (App. F1)

3. 30 U.S.C. § 226 (j) (App. F2-8)

C. Regulations

43 C.F.R. 3186.1 (formerly in 43 C.F.R. 192.20 and 192.21 (App. F8-12)

STATEMENT OF THE CASE

This is a case where a widowed homemaker's multi-hundred-million-dollar property rights were wrongfully taken from her by application of the archaic, little-used common law doctrine of presumed grant.

Mike Abraham and wife, Roseline, of Albuquerque, New Mexico, ("Seller"), and El Paso Natural Gas Company, ("El Paso"), as buyer, made a written contract dated

September 19, 1952 (commonly known as "GLA-59"). Sellers sold their gas rights in eight (8) federal oil and gas leases issued by the United States (federal leases), to El Paso, reserving (1) the oil rights, and (2) the rights to liquid hydrocarbons. In addition to the cash consideration paid for the gas rights, El Paso granted Mike and Roseline Abraham an option to repurchase for $25,000.00 the entire interest upon El Paso's producing a certain amount of gas from the federal leases (App. A4).

A. The gas rights in the following federal leases were sold in GLA-59:

SF 079380	SF 079002
SF 079381	SF 079012
SF 079382	SF 080713
SF 079383	SF 080714

All of the leases were placed in federally-approved units, under federally-approved

Unit Operators who are in exclusive possession of all operations under the supervision of U.S. personnel.

B. On June 1, 1963, Mike and Roseline Abraham assigned their oil and liquids rights in SF079002, SF079012, SF080713B, SF080714A, NM012292, and NM012735 to Rincon Oil and Gas Corporation ("Rincon"). (App. E2-3 [20]; A6).

1. Mike and Roseline Abraham did not mention the option to repurchase the entire interest for $25,000.00, or their remaining interests in leases SF079380, SF079381, SF079382, and SF079383 in the conveyance. (App. A6-7; E3-4).

2. The New Mexico Supreme Court found that Mike and Roseline "agreed to sell" all of these unmentioned interests to Rincon even though they

did not document the transfer (App. A13), and used the doctrine of presumed grant to take the valuable option and the four leasehold interests from Roseline Abraham.

C. An involuntary bankruptcy proceeding (under the Bankruptcy Act of 1898) was filed against Mike Abraham in September 1964, in Dallas, Texas. (App. A7) Roseline Abraham was never a party to the bankruptcy. (App. E3) In submitting a proposed plan for an arrangement with unsecured creditors, Mike Abraham mistakenly stated that Rincon owned the option to repurchase and SF079380, SF079381, SF079382, SF079383. That plan was never acted on or adopted. (App. A8)

D. PWG Partnership ("PWG") purchased Rincon's properties in September 1973, with both a specific listing of leases and a

"global" conveyance. (App. A13-14; G-1-2). The description of the transferred assets failed to mention the option to repurchase (App. G1-2), and there was no documentation of any transfer of the option or of the above four federal leasehold interests. (App. A15)

E. Mike Abraham died intestate on September 1, 1985.

F. The time to exercise the option matured on January 15, 1989. (App. C4)

G. Roseline Abraham exercised her option to repurchase in October 1989, in writing, and tendered the option price in a certified check for $25,000.00, which El Paso negotiated.

> "On or about October 13, 1989, a twenty-five thousand dollar check was tendered on behalf of Roseline Abraham to El Paso. The check was deposited by routine clerical procedures, but upon discovery of the error, El Paso tendered back to Roseline Abraham's representative a check in the same

amount in return, which was deposited and cashed." (Excerpt from Statement of Undisputed Facts).

H. The trial court found that the oil rights, the right to liquid hydrocarbons, and the option to repurchase are each a separate property right. (App. E2) The New Mexico Supreme Court in affirming the decision of the trial court, wrote, "Beginning in 1976, El Paso Natural Gas began paying PWG for liquid hydrocarbons extracted from gas under the GLA-59 leases," and affirmed the finding of the trial court that such payments constituted exclusive possession by PWG of all three separate rights, i.e. the oil, the liquid hydrocarbons, and the option to repurchase. (App. E4 #4)

I. After perfecting her appeal to the Supreme Court of New Mexico, Roseline Abraham died on March 7, 1992. Steve J.

Abraham, Personal Representative of her Estate, and her three surviving children (Michael C. Abraham, Steve J. Abraham and Diane Abraham Hinkle) were substituted as Appellants in the Supreme Court of New Mexico.

ERRORS PRESERVED BY PETITIONERS

Lack of jurisdiction can be asserted at any time.

In their Motion for Rehearing filed with the Supreme Court of New Mexico, Petitioners stated the following grounds:

> "A. In adopting the presumed grant theory as a rule of law in this case, the opinion has overlooked Roseline Abraham's constitutional rights and her statutory rights. The opinion has divested her of property based upon her husbands separate actions, and without her having due process in his personal bankruptcy court proceedings."
>
> "D. By its opinion adopting the doctrine of presumed grant this Court has created an issue which may conflict with paramount federal law and would require reversal on

> jurisdictional grounds or a remand to consider facts and briefing relative to federal jurisdiction. This issue is raised for the first time on this motion for reconsideration."

By written objections and exceptions in the trial court between the decision and the judgments, and after the judgments, and in the appeal to the Supreme Court Petitioners repeatedly complained about no pleading, and that no possession was possible in this case.

REASONS FOR GRANTING THE WRIT

I.

A STATE COURT HAS NO JURISDICTION, OR POWER, TO DIVEST THE UNITED STATES OF ITS TITLE TO OIL IN PLACE UNDER FEDERAL OIL AND GAS LEASES AND VEST TITLE IN A PRIVATE PARTY. A JUDGMENT THAT DOES SO IS VOID BECAUSE IT VIOLATES THE PROPERTY AND SUPREMACY CLAUSES OF THE CONSTITUTION OF THE UNITED STATES.

The judgment in this case divests the United States of its ownership of the oil underlying federal leases SF079380, SF079381, SF079382, SF079383; and is void.

The Supreme Court of New Mexico affirmed the following judgment of the trial court:

> "1. Defendants PWG Partnership . . . have lawful possession and since 1973 have had and continue to enjoy perfect and full legal title . . . to the oil . . . in and that may be extracted from such leases: SF079380, SF079381, SF079382, SF079383, SF080713B, SF080714-A, NM012292, SF079002, NM012735, and SF079012 . . ." (emphasis supplied) (App. D2-5).

The foregoing adjudication that PWG, et al own full legal title in and to the oil under said lands divests the title of the United States to the underlying deposits of oil in federal lands. In the Mineral Leasing Act of 1920, as amended (30 U.S.C. §§181 et seq.), the United States reserves and retains the ownership of oil and gas

underlying public lands when it issues oil and gas leases. A federal oil and gas lease grants possessory rights only. Boesche v. Udall, 373 U.S. 472, 477 (1963).

The Property Clause of the Constitution of the United States (Art. IV, § 3, cl. 2) provides that Congress has the exclusive power to dispose of public lands:

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States . . ."

That power is without limitation. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Gibson v. Chouteau, 80 U.S. 92 (1872).

No court, federal or state, has the power to vest legal title to oil in place under federal leases in anyone. Bockfinger v. Foster, 190 U.S. 116, 126 (1903).

The judgment must be reversed because it violates the Constitution of the United States by usurping the exclusive power of Congress over property owned by the United States. If not reversed, the decision of the Supreme Court of New Mexico severely threatens (1) property belonging to the United States, (2) the exclusive power of the Congress to control the disposition of the property of the United States, and (3) the Rules and Regulations prescribed by Congress and the Secretary of the Interior.

The findings, holdings, and final judgments of the New Mexico State Courts below which divest the ownership of the United States of oil underlying lands belonging to the United States of America and place it in private hands and ownership violate the Constitution of the United States. The impact and significance of such

unconstitutional judgments extend far beyond the serious actual breaches of the Constitution and their resultant deprivation of federal ownership into the private domain, as is demonstrated in this case. Here, the extension of the unconstitutional concepts and judgments not only divested the United States of the ownership of oil underlying federal lands and federal leases, but also divest Petitioners and El Paso, the record owner, by recognizing ownership of oil in federal leases by a private individual trespasser and permitting adverse possession by such individual of a non-physical conditional option to purchase related to federal leases.

II.

THE JUDGMENTS OF THE NEW MEXICO COURTS BELOW ARE VOID BECAUSE THEIR ERRONEOUS RECOGNITION OF THE RIGHTS OF UNLAWFUL

POSSESSION OF FEDERAL LEASES THREATENS THE POWER OF CONGRESS AND THE SECRETARY OF THE INTERIOR TO CONTROL THE OCCUPANCY AND USE OF FEDERAL LANDS:

The Supreme Court of New Mexico held that a presumed grant "may be found from evidence supporting the inference (a logical presumption) of a lost or neglected grant followed by long-term, open, active, exclusive possession of property under claim of right and acquiescence or no resistance by interested parties to that possession or claim of right" (emphasis added) (App. A34).

In this case the New Mexico courts ruled that exclusive "possession" by PWG of real property interests of Roseline Abraham (her retained oil rights in federal leases SF079380 and SF079381 in the 32-8 Unit, and in federal leases SF079382 and SF079383 in

the 30-6 Unit) justifies the finding of a presumed grant by her to PWG and further justifies the presumption of a grant by her of the option to repurchase the entire gas rights sold by Mike and Roseline Abraham to El Paso in 1952 (and a grant of rights to liquid hydrocarbons) (App. A34-35).

The Supreme Court of New Mexico bases its presumption of the grant of Roseline Abraham's interests in federal leases on adverse, exclusive possession of the property by PWG, a private party. (App. A34) The "property" in this case is "the oil and liquid hydrocarbons in and that may be extracted from" specified federal leases, and the option to repurchase. (App. E5-6) The decision in this case by a state court interferes with federal law and significantly threatens the exclusive power of Congress and the Secretary of the

Interior to control the possessory rights granted by Congress and the Secretary to Unit Operators and to lessees. Under the Mineral Leasing Act of 1920, as amended (30 U.S.C. §§181, et seq), the United States reserves and retains the ownership and control of the oil and gas underlying public lands. The United States grants only regulated possessory rights to lessees.

". . . Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary . . . He may . . . require the lessee to operate under . . . a unit plan . . . and he may prescribe rules and regulations in minute detail as to all facets of the workings of the land, 30 U.S.C. § 189; 30 C.F.R. pt. 221." Boesche v. Udall, 373 U.S. 472, 477-78, 83 S. Ct. 1373, 1376, 10 L. Ed. 2d 491 (1963).

In order to conserve resources, and to provide economic benefits and facility of regulation, Sec. 17(b) of the Mineral Leasing Act of February 25, 1920, as amended

(30 U.S. C. § 226, [j] authorizes lessees to unite and, under the supervision of U.S. Government personnel, to collectively devise a plan of development and operation. 43 C.F.R. 3186 (formerly 30 C.F.R. 226.1) (App. F8-12).

The Unit Operator of each unit is empowered, and charged, with <u>exclusive possession</u>. ". . . the exclusive right, privilege, and duty of exercising any and all rights . . . necessary . . . for producing, . . . allocating and distributing the unitized substances are hereby delegated to and shall be exercised by the Unit Operator . . ." 43 C.F.R. § 3186(8) (App. F8-12) (formerly 30 C.F.R. § 226) Undocumented intruders are excluded by the United States from any possession. The government maintains its paramount control of the use of its property. The government

protects the exclusive possession of the unit operator whom it has charged with the development, operation and use (under its supervision) of oil and gas leases covering thousands of acres of land.

The agencies of the federal government are charged with protecting the surface owner and the reservoir from damage, accounting for payments of rentals and royalties to the United States, inspection of records, operations, production, and prices, protecting the environment, conservation of resources and prevention of waste, enforcing the government policies of no discrimination, no monopolies, and no aliens, issuing leases, regulating transfers of interests, and protecting its properties from trespass or injury.

In short, to assert a possessory right in a federal lease requires assent of the

officials of the United States entrusted with the control of oil and gas owned by the United States. The decision by the New Mexico Court interferes with the power of the Bureau of Land Management ("BLM") to entrust exclusive possession in a designated, approved Unit Operator, Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966). Recognizing exclusive possession in someone other than the Unit Operator usurps the exclusive power of the federal government to control the occupancy and use of its public lands, and the power to protect federal land from trespass or injury. Const. Art. IV, § 3, Cl. 2 (the property clause); and Art. VI, §2 (the supremacy clause); Gibson v. Chouteau, 80 U.S. 92 (1872); Light v. United States, 220 U.S. 523, 536 (1911); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917);

Kleppe v. New Mexico, 426 U.S. 529, 540 (1976).

The Property Clause provides,

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States . . ."

That power of Congress is without limitations. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Kleppe, supra.

Congress has exclusive power to control the occupancy and use of public lands, and has the power to protect them from trespass. Utah Power & Light Co., supra (a trespass case); Kleppe, supra.

Parenthetically, no title to or interest in U.S. public lands can be acquired by adverse possession, or by prescription. Jourdan v. Barrett, 45 U.S. 169 (1846).

The decision of the Supreme Court of New Mexico should be reversed because its doctrine of presumed grant is predicated on exclusive adverse possession of federal leases. The decision violates, and interferes with, exclusive federal power and control, and should be reversed.

III.

The New Mexico Courts violated the due process requirement of the Fourteenth Amendment to the Constitution of the United States in depriving Roseline Abraham of her property.

Failure to plead issue of presumed grant.

1. After mammoth and expensive discovery, amendments of pleadings, and a copious, rambling pre-trial order setting forth the positions of the parties, the trial court started a bifurcated trial on the issue of "ownership." The doctrine of

presumed grant was never plead or even mentioned directly until after the end of the trial. (App. A31).

2. In its ruling at the end of the trial, the trial court issued a decision against Roseline Abraham, finding a presumed grant by Roseline Abraham of her rights. A majority of a panel of the Supreme Court of New Mexico, over a dissent, affirmed and approved that ruling, which violates Roseline Abraham's 14th Amendment right to not be deprived of her property without due process of law.

3. Petitioners had no notice through the pleadings of their opponents or through the pre-trial orders of the trial court that the issue of "presumed grant" would be litigated. Had Petitioners been advised that such issue was in the case, Petitioners

would have promptly removed the case to federal court.

4. All elements of a presumed lost deed must be pleaded and proved. Clark v. Amoco Prod. Co., 794 F2d 967, 971 (5th Cir. 1986). Also see Hunt v. McCain, 73 S.W.2d 564, 566 (Tex. Civ. App. - Waco 1934, writ dism'd).

Lack of notice of adverse possession.

5. A grant of property may be presumed only if there is notice of adverse possession to, and acquiescence by, the owner. Love v. Eastham, 154 S.W.2d 623, 625 (Tex. 1941). As Justice Franchini concluded in his dissent:

> Roseline had no notice that PWG believed themselves to be the owner of the option. Upon notice that the conditions of the option had been met, Roseline immediately exercised her option. What action could she have been expected to take before that time? And since the option has not been bargained for or expressly documented in any of the agreements,

she could not have been expected to contest its ownership . . . (App. A54-55)

I see no reason to apply the doctrine of presumed grant. Without it, there is no assignment, conveyance or any divesting action by Roseline . . . I would reverse . . . because to do otherwise gives PWG a valuable interest that they never contracted or bargained for . . . (App. A56-57)

Doctrine of presumed grant does not apply to intangible personal property. (An issue of first impression.)

6. Because of the reservation in the United States of all legal title to oil and gas in place under public lands, the leasehold interests at issue in this case are not real property, Boesche, at 373 U.S. 478, and, not being physical, constitute intangible personal property. Given the requirement of proof of the trespasser's "open and notorious dominion and control" of the property to establish a presumption of grant, Love, at 625, in cases where the property in question is intangible personal

property it is impossible to prove sufficient possession.

As Justice Franchini astutely pointed out in his dissent:

> The majority refers in two instances to the "possession" of the option by PWG. That is an interesting concept... An even more interesting question is how do you occupy an option. (App. A53-54)

In fact, the concept of adverse possession or presumed grant of intangible personal property is so peculiar that, before this case, there is no published opinion known to Petitioners upholding it.

Violations of New Mexico statutes.

7. In presuming a grant of community real property by Roseline Abraham, a married woman, the state courts arbitrarily denied to her the statutory protection that a spouse can only be divested of her interest in community real property through a written conveyance signed by her. NMSA 1978 § 40 -

3 - 13 (formerly NMSA 1953 § 57 - 4A - 7) (App. I-1-4)

8. The Supreme Court of New Mexico disregarded New Mexico statutory and case law that any purported conveyance of her property is void without her signature, even though her spouse signed, Arch, Ltd. v. Yu, 766 P2d 911 (1988) (opinion written by same person who wrote the opinion in this case), based on the arbitrary finding that "she agreed to sell".

9. The trial court arbitrarily found that Mike Abraham had "general authority" from her ("whatever he wanted her to sign, she signed") and disregarded another salutary statute in New Mexico that any authority of an agent to bind a spouse as to community real property requires a written power of attorney, filed for record. NMSA 1953, § 70 - 1 - 6 (App. I-3-4-5).

10. A federal court would have recognized and ruled that PWG's assignor, Rincon, ("the grantee"), was satisfied with the performance of the agreement to convey by the Abrahams.

a. The New Mexico Courts ignored the uncontradicted testimony of W.H. Hudson, exclusive manager of Rincon before and after June 1, 1963, (App. H1-3) that he, and Rincon, were satisfied with the performance of the Agreement to Convey by the Abrahams. (App. H1-3) The uncontradicted testimony of Billie Fuller corroborated Hudson - Rincon was satisfied. (App. H3-8)

b. A federal judge would follow the rule laid down in Williams v. Eggleston, 170 U.S. 304 (1898):

> . . . the parties to a contract are the ones to

> complain of a breach, and if they are satisfied with the disposition which has been made of it, and all claims under it, a third party has no right to insist that it has been broken . . ."

c. In following that rule, a federal judge would rule that PWG et al have no standing.

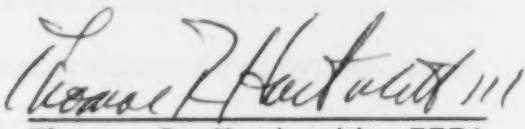
11. A federal court would not write a new contract and divide the indivisible option (one $25,000 purchase price) into ten leases, each of which differs in size and value, by rewriting the agreement of the parties. The unambiguous, certain language of the option, ". . . shall have the option to repurchase . . . for . . . $25,000.00 the entire interest of Seller in the said leases being sold herein . . ." (App. A4) Both parties to the contract, El Paso and Roseline Abraham, repeatedly maintained that the option could not be divided by leases.

The trial court arbitrarily ruled that it was divisible. (App. E2). The New Mexico Supreme Court arbitrarily affirmed and approved the trial court's writing a new contract for the parties.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX - A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

EL PASO PRODUCTION COMPANY, et al.,
Plaintiffs-Appellees, and Cross-Appellants,

v.

PWG PARTNERSHIP, et al.,
Defendants-Appellees,

v.

Steve J. ABRAHAM, Personal Representative of the Estate of Roseline Abraham, and Steve J. Abraham, Michael C. Abraham and Diane Abraham Hinkle, individually and as surviving children of Roseline Abraham, deceased,
Defendants-Counterclaimants-Appellants and Cross-Appellees.

No. 20210.

Supreme Court of New Mexico.

Dec. 1, 1993.

Rehearing Denied Jan. 3, 1994.

OPINION

RANSOM, Chief Justice.

The Abraham family appeals from a declaratory judgment in an action brought by

El Paso Production Company (El Paso) to determine the validity of an option contract and ownership of the right to repurchase gas rights under a federal oil and gas lease. El Paso cross-appeals from an amended judgment wherein the district court reduced a sanction for contempt of court from $24,000 to $300. On the Abrahams' appeal we affirm the decision of the court below, but on the cross-appeal we reverse and remand for entry of judgment that conforms to the findings of fact.

Facts regarding ownership. In the late 1940s and early 1950s, Mike and Roseline Abraham, along with Mike Abraham's brother and sister-in-law, J.R. and Dorothy Abraham, acquired several federal oil and gas leases in the San Juan Basin of northwestern New Mexico. Mike and Roseline held record title to eight of the ten leases involved in this

litigation, and J.R. and Dorothy held record title to the other two. In 1951, the Abrahams agreed to sell to General American Oil Company of Texas one-half of their interest in the leases. Under this agreement, General American was to provide for the development of the oil and gas and to advance or "carry" the Abrahams' expenses associated with this development. These "carried working interest" expenses would then be paid from the profits attributable to the Abrahams' retained interest.

In 1952, General American assigned its interest to El Paso Natural Gas Company (the parent company of El Paso Production Company). On September 25 and 26, 1952, Mike and Roseline, as sellers, and El Paso Natural Gas, as buyer, executed an oil and gas lease sale agreement known as GLA-59. Mike and Roseline agreed to sell to El Paso

Natural Gas their remaining carried working interests in the leases described above for $925,000. In the agreement, the Abrahams reserved from the sale all existing royalties and overriding royalties, all oil under the leased lands, and all liquid hydrocarbons extracted from the gas by field separators. The Abrahams also reserved the right to repurchase the leases for a cash payment of $25,000 after El Paso Natural Gas had produced 30,000,000 mcf of gas from their interest plus enough gas to cover the costs of development and production under the original General American contracts. This repurchase option agreement is the subject of the current litigation. GLA-59 was recorded in the land title records of San Juan and Rio Arriba Counties and the assignments of the individual leases were executed in 1953. In May 1963, the Abrahams

sought to pay off debt and to consolidate their San Juan Basin oil and gas interests, including the GLA-59 reserved interests. To secure financing of $1.5 million dollars from Chemical Bank Trust Company of New York, Mike and Roseline reorganized one of their corporations, Universal Minerals, to which were transferred their reserved oil and gas interests and those of J.R. and Dorothy. Chemical Bank paid most of the proceeds from the financing to named creditors of Mike and Roseline, Universal Minerals, and J.R.

Mike and Roseline signed a transfer agreement of May 29, 1963 that included a description of the following GLA-59 oil and gas assets transferred to Universal Minerals:

> 7. Carried working interests in the 30-6 Unit, Rio Arriba County, New Mexico (reference is made to Exhibit "B" of the 30-6 Unit Agreement for a

complete description of said interests.)

8. Carried working interests in the 31-6 Unit, Rio Arriba County, New Mexico (reference is made to Exhibit "B" to the 31-6 Unit Agreement for a complete description of said interests.)

J.R. and Dorothy ratified the agreement in order to merge any retained interests into that transaction. Universal Minerals simultaneously became Rincon Oil & Gas Corporation, with Mike Abraham owning 80% of the stock and an option to purchase the remaining 20% from W.H. Hudson, a corporate manager who had been hired to manage Rincon until Chemical Bank was repaid the outstanding loan amount. On June 3, 1963, Mike and Roseline executed a conveyance to Rincon describing six leases in GLA-59. Apparently, Mike and Roseline may have failed to execute conveyances for the two leases

remaining in their names, and J.R. and Dorothy may have executed no conveyances.

In 1964, Mike Abraham was forced into bankruptcy. He signed under oath the schedule requiring the identification of all assets he owned. The schedule did not include any assets in the GLA-59 leases, but did include Abraham's 80% ownership in Rincon's stock and his option to purchase the outstanding stock. Abraham sought confirmation of a reorganization plan to sell Rincon to another corporation, stating that

> Rincon also owns an undivided working interest in oil production and liquid hydrocarbon production covering several thousand acres of lands in T30N R7W, T30N R6W, and T32N R8W. In addition to owning the oil rights in said acreage, Rincon owns an option (at such time as El Paso Natural Gas Company has produced and saved from the lands subject to the agreement gas attributable to the interest of Rincon in a total amount of 30,000,000 mcf,

> together with an amount of gas sufficient to reimburse El Paso for all production, development, and operating costs) to repurchase all of the interests sold to El Paso Natural Gas Company for the sum of $25,000 in cash.

The bankruptcy court did not approve this plan, but it did approve the sale in 1966 of all of the bankruptcy estate's interest in the Rincon stock to Chemical Bank in discharge of $2 million of debt. No one raised objections to the sale.

At trial, the district court received evidence that Mike Abraham had knowledge during the bankruptcy proceedings that the option to repurchase the gas leases could ripen as early as 1972. In July 1973, PWG Partnership contracted with Rincon (now owned by Chemical Bank) to purchase all of Rincon's interests in all oil and gas properties and estates. Rincon made both a

specific and a general conveyance to PWG, with the general conveyance transferring:

> All leasehold ... interests ... and other interests in oil, gas and other liquid hydrocarbons owned and held by Grantor in any lands located within the Continental limits of the United States of America, and any contracts ... and other instruments which relate thereto....

The district court heard testimony that, while Mike Abraham was a brilliant and astute oil and gas investor, he had terrible record-keeping skills, and the general conveyance was intended to pick up all interests not covered by specific conveyances. Beginning in June 1976, El Paso Natural Gas began paying PWG for liquid hydrocarbons extracted from gas under the GLA-59 leases. Mike Abraham died in 1985. El Paso Natural Gas assigned its interests in the leases to El Paso in 1986. In the summer of 1989, PWG attempted to exercise

its option to repurchase the gas leases, believing that the conditions precedent had been met. When Abrahams' attorney Thomas Hartnett III (who had represented Mike in the bankruptcy and both Mike and Roseline in the reorganization of Universal Minerals) heard of PWG's claim, he informed Roseline and her children, who then also laid claim to the option. This suit ensued.

Findings and conclusions of the trial court.--The option to repurchase. After many motions for summary judgment and a full trial on the merits to determine the ownership of the option, the trial court first concluded that the option to repurchase was valid and enforceable against El Paso. This law of the case has not been challenged on appeal unless this Court reverses the decision on ownership and finds that the Abrahams own the option, in

which case El Paso has raised several arguments challenging the trial court's conclusion on validity.

The trial court found that the agreement of May 29, 1963, in which both Abraham brothers and their wives agreed to transfer to Rincon their carried working interests in the GLA-59 leases, was ambiguous because all "carried working interests" had already been assigned to El Paso Natural Gas. The court then looked to the referenced Exhibit "B" for a description of the interests in order to ascertain what the Abrahams were agreeing to convey. That exhibit listed only the leases and a variety of oil and gas rights. There was no language in the agreement or in the exhibit limiting the scope or rights to be conveyed to Rincon. The court determined from the four corners of the agreement that the

phrase "carried working interests" clearly referred and must have been intended to refer to "rights in or to the oil and gas" in a given lease. The court decided that the agreement of May 29, 1963 intended to transfer all rights that remained in the leases, which consisted of the reserved oil and liquid hydrocarbon rights and the option to repurchase the gas leases. The court buttressed its interpretation by noting that the conduct of the parties after the transfer was consistent with that interpretation. Specifically, Mike Abraham, J.R. Abraham, Hartnett, Hudson, Chemical Bank, El Paso Natural Gas, and the bankruptcy trustee all accepted and acted for some twenty-six years upon the notion that those rights had been transferred to Rincon. Finally, the court concluded that the conveyance of June 3, 1963 spoke in

terms of conveying all of Mike and Roseline Abraham's "right, title, interest, claim and demand in and to the oil and gas properties," and determined that the conveyance, from its explicit language, was intended to pass, in the way of oil and gas rights, everything that was able to be transferred as to a mentioned lease, and that "gas rights" included the right to buy back the gas production in a given lease on the happening of a certain event. (In the alternative, the court found that since the option to repurchase benefitted only the holder of the reserved oil rights, that option was a covenant running with the oil and liquid hydrocarbons and passed with the conveyance of the oil and liquid hydrocarbons in that lease.)

The leases for which there was no conveyance documentation. The trial court

found that the Abrahams agreed to convey to Universal Minerals (Rincon), and that Chemical Bank (and, later, PWG) paid for the conveyance of the Abrahams' interests in all ten of the leases described in the GLA-59 agreement, even though PWG only could produce conveyances for six leases. The court found that because of the scant documentation provided by Mike Abraham and because at the time of the agreement Rincon had no separate counsel who could check to be sure that all conveyances had been made, the general conveyance from Rincon to PWG purported to convey all assets of every kind, both documented and undocumented. Further, the court found that because oil and gas resources are subject to permanent depletion, an owner must diligently act upon his rights in order to avoid loss of the resource. These facts, together with PWG's

long-continued possession of the rights with no objection or challenge from the Abrahams, led the court to believe that Mike Abraham was telling the truth in his bankruptcy--that all necessary conveyances had been made such that he and his wife held no legal or equitable title in the leases. The court then invoked a property rule that presumed a grant from Mike and Roseline Abraham and J.R. and Dorothy Abraham for the four leases that had been included in the transfer agreement but for which there was no conveyance documentation. Under that presumption, the court assumed that "all that might lawfully have been done to perfect legal title was in fact done, and in the form prescribed by law."

Alternative findings and conclusions. In the event of reversal by this Court, the district court made alternative findings and

conclusions. The court found that PWG should be granted legal title to the leases under the doctrine of equitable conversion. The court also found that the Abrahams and their heirs were judicially estopped from laying claim to the interests because of the sworn testimony to the bankruptcy court that the Abrahams did not own the interests because they had been sold to Rincon. Finally, the trial court found that judicial estoppel also should apply because the Abrahams had received $1.5 million for those interests plus forgiveness of debt in the bankruptcy action in exchange for the sale of the assets to Rincon. The court stated that to recognize the Abrahams' claim to the interests now "would be playing fast and loose with, and subverting, the system of justice."

Issues in the Abrahams' appeal. Finding them dispositive, we address only two of the Abrahams' claims of error: that the district court erred in ignoring the intent of the parties to GLA-59 that the 1952 option to repurchase was personal to Mike and Roseline Abraham, and that the district court erred as a matter of law in applying the doctrine of presumed grant to divest Roseline Abraham of her right to the unconveyed leases.

Because we believe that the court correctly interpreted the contract and correctly applied the doctrine of presumed grant, the alternative findings and conclusions are not relied on, and error claimed in that regard will not be addressed. Likewise, because the court found that the option to repurchase passed to Rincon in the conveyances and agreement

of May 29, 1963, all of which were signed by Roseline Abraham, questions as to due process and equal protection (by taint from the acts of her husband) are not applicable--Roseline Abraham clearly conveyed her rights in the option to Rincon. Finally, determining that Roseline Abraham did not have a right to a jury trial because all relief requested was equitable, we find no merit in the argument that the trial court erred in refusing to grant a jury trial. See Evans Fin. Corp. v. Strasser, 99 N.M. 788, 789, 664 P.2d 986, 987 (1983) ("If the remedy sought is legal, parties are entitled to a jury trial; if the remedy sought is equitable, there is no jury trial as of right.").

The option to repurchase was an assignable right. The Abrahams urge this Court to find that the 1952 option to repurchase was

personal to Mike and Roseline and not assignable. They argue that Texas law must be used to interpret the contract because the parties agreed that Texas law would control. Citing Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189 (Tex.Civ.App.1977), writ ref'd n.r.e., the Abrahams claim that in Texas, options to repurchase are personal covenants that cannot be transferred. Prochemco, however, does not support that proposition and is not applicable to the facts of this case. In Prochemco, the agreement provided that the terms of a contract were covenants running with the land, and the agreement had no provision granting successors or assigns the right to exercise the option to extend the contract. Id. at 190. The Prochemco court noted that parties may determine that an option will be personal and nonassignable, see id. at 191,

but by no stretch of interpretation did the court hold that all option contracts are personal and nonassignable. In contrast, the Texas courts, see e.g., Hott v. Pearcy/Christon, Inc., 663 S.W.2d 851, 853-54 (Tex.App.1983), writ ref'd n.r.e., cite favorably to the Contracts Hornbook written by Calamari and Perillo, which suggests that once an offer to purchase has ripened into an option contract by the payment of money to secure the option, the rights created usually are assignable, unless the option calls for some sort of personal performance. John D. Calamari & Joseph M. Perillo, Contracts § 18-32 (3d ed. 1987). Professor Ronald Benton Brown, in his Note on real estate purchase options states that

> [t]he rights of the optionee may be transferred and the obligations of the optionor may bind those to whom the optioned

> land has been transferred. The question of whether that has happened is primarily a question of the intent of the parties to the option.... Ordinarily, an optionee would be unlikely to bargain for a right which could be defeated by the sale to another and so the option should be presumed binding on the optionor's successors unless otherwise agreed.

Ronald B. Brown, An Examination of Real Estate Purchase Options, 12 Nova L.Rev. 147, 187-88 (1987). In the case at bar, the parties expressly provided that the GLA-59 agreement would "inure to the benefit of and be binding upon the said parties and their respective heirs, successors and assigns."

The Abrahams argue that if this Court finds that the option was assignable, it would violate the rule against perpetuities, and the Court should construe the contract

so that a violation would not occur[1]. At common law, the rule was designed to prevent the vesting of a future interest in property at an indefinite date that could exceed a length of time established as a life in being at the time of the creation of the interest plus twenty-one years. See Producers Oil Co. v. Gore, 610 P.2d 772, 774 (Okla.1980); Gartley v. Ricketts, 107 N.M. 451, 453, 760 P.2d 143, 145). The rule was judicially designed to prevent remote vesting of contingent interests in real property. Cambridge Co. v. East Slope Inv. Corp., 700 P.2d 537, 540 (Colo.1985) (en

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[1] We note that the rule against perpetuities is no longer part of our New Mexico statutes. See NMSA 1978, § 47-1-17.1 (Supp. 1992) "perpetuities" from section); NMSA 1978, § 47-1-17.1 (Supp. 1992) (repealed). Under the old statue, New Mexico took a "wait and see" and "cy pres" approach to determining if future interests were void. See NMSA 1978 § 47-1-17.1 (Repl. Pamp. 1991); Gartley v. Ricketts, 107 N.M. 451, 453, 760 P2d 143, 145 (1988).

banc). Options to purchase leased premises within the term of the lease are exempt from the rule. See id.; Gore, 610 P.2d at 774 (holding that rule does not apply to conditional preemptive options in operating agreements under oil and gas leases because oil and gas production cannot last indefinitely and rights are always terminable); cf. III Lounge, Inc. v. Gaines, 217 Neb. 466, 348 N.W.2d 903, 907 (1984) (lease provision allowing exercise of option "at any time" would be construed to allow exercise at any time within the term of the lease).

The option to repurchase in the case at bar was conditioned upon an event that was likely to occur or fail to occur within a reasonable amount of time because of the nature and use of the reservoir. Under the operating agreement that formed the basis of

GLA-59, El Paso was required to drill at least eighteen wells within five years and agreed to produce and market the gas under the terms of the agreement.

As the Abrahams stated in their brief, the Texas case of Mattern v. Herzog, 367 S.W.2d 312 (Tex.1963), gives us guidance on the Texas application of the rule against perpetuities: "When the wording of the option does not compel a construction that the parties intended that the time element should be unlimited, the court will not construe an option contract ... to run for an indefinite time and thus destroy the validity of the option provision." Id. at 319. Because we can infer a reasonable time limitation in the agreement, and because the condition precedent from which the option arose did occur within twenty-one years of the death of a life in being at the creation

of the option, no violation of the rule occurred under Texas or New Mexico law. We affirm the district court's conclusion and hold that the option to repurchase in the GLA-59 agreement was an assignable right, not personal to Mike and Roseline Abraham.

The doctrine of presumed grant. The Abrahams claim that New Mexico does not recognize the doctrine of presumed grant, and that even if we do recognize it, the theory should not be applied in this case because it was never pled, tried, nor reasonably contemplated by the Abrahams during the trial. The doctrine of presumed grant is a rule of property law that crystallizes from a rebuttable presumption. See 3 Am.Jur.2d Adverse Possession § 5 (1986). For many years it has received recognition in the United States as an appropriate means to quiet long possession

and it is based upon concepts of both logic and policy. It is logical because the inference of a lost or neglected grant is a natural one to be drawn from the facts; it serves the policy of protecting those who have maintained long possession of property with acquiescence from the record owner. Fletcher v. Fuller, 120 U.S. 534, 7 S.Ct. 667, 30 L.Ed. 759 (1887), appears to be the seminal case applying the doctrine. There, the Fletchers, whose family had been in possession of land for almost 100 years, could not produce a deed conveying title to the Fletchers' vendor, who was the grandson of the original owner. The devisees of the original owner claimed title under the owner's will, which had been probated some twelve years before the transfer to the Fletchers' predecessor. In the trial on the merits, the Fletchers asked for a jury

instruction as to the presumption the jury might make of a lost grant to their ancestor in title. The instruction the court refused to give stated, in part,

> "if you find that you can presume a grant, if you find from the testimony that there was a lost deed ... so that Jeremiah had a good title to convey to Stephen Jencks, that makes the title of the defendants here complete.... [T]he presumption ... was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor."

Id. at 544-45, 7 S.Ct. at 673.

In finding that the trial court erred in refusing to give the charge, the Supreme Court stated:

> It may be, in point of fact, that permission to occupy and use was given ... upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain....
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> * * * * * *

> The law ... by reasonable presumptions ... affords the necessary protection against possible failure to obtain or to preserve the proper muniments of title....
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> * * * * * *
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> It is not necessary, therefore, ... for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution.

Id, at 545-47, 7 S.Ct. at 674.

The Fletcher court added that

> presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done, and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, then the jury may be instructed that it is their duty to presume such a conveyance, and thus quiet the possession.

Id. at 550, 7 S.Ct. at 676. As in Fletcher, there is proof in this case that the former owner actually agreed to sell and did sell the property in question and then acquiesced in the buyer's rights and interests in the property. Under New Mexico Rule of Evidence 301 the resulting logical presumption of a lost or neglected grant is not mandatory, see Mortgage Inv. Co. v. Griego, 108 N.M. 240, 243-44, 771 P.2d 173, 176-77 (1989), but as in Fletcher, under a rule of property law the presumption of a grant arguably is mandatory as a matter of public policy if unrebutted. Cf. Hester v. Sawyers, 41 N.M. 497, 504, 71 P.2d 646, 650 (1937) (holding that once party has proven statutory time period of adverse possession, presumption of grant is conclusive); Baker v. Certain Lands, 19 Ark.App. 253, 720 S.W.2d 318, 320-21 (1986) (holding that when one in

possession has paid taxes on lands previously forfeited to the state, redemption by grant is presumed as a matter of law).

Texas courts require evidence of three elements in order for the presumption of grant to arise: "long-asserted and open claim, adverse to the apparent owner, ... non-claim by the apparent owner, ... [and] acquiescence by the apparent owner in the adverse claim." Magee v. Paul, 110 Tex. 470, 221 S.W. 254, 256 (1920); see also Bodin v. Gulf Oil Corp., 707 F.Supp. 875, 884 (E.D.Tex.1988) (holding that the doctrine of presumed grant "is designed to quiet title where there is (1) a long period of occupancy and dominion of the land by one party, that is (2) inconsistent with the record ownership vested in another party during which time (3) the legal owner did

not attempt to exercise any rights"); cf. United States v. Fullard-Leo, 331 U.S. 256, 273, 67 S.Ct. 1287, 1295, 91 L.Ed. 1474 (1947) (requiring, for the doctrine of lost grant to be applicable, possession under a claim of right, actual, open and exclusive, and stating that chain of conveyances and payment of taxes is important). It is the acquiescence in the possession and assertion of ownership that affords the basis for finding that the title passed to the possessor by deed or otherwise. M.T. Humphries v. Texas Gulf Sulphur Co., 393 F.2d 69, 72 (5th Cir.1968) (applying Texas law). Although there is dicta in Clark v. Amoco Prod. Co., 794 F.2d 967 (5th Cir.1986), that in Texas a presumed lost deed must be pled and proved by the party asserting it, see id. at 971, a reading of the case on which that dicta was based

(Harvey v. Humphreys, 178 S.W.2d 733 (Tex.Civ.App.1944), writ ref'd n.r.e.) does not lead this Court to that same conclusion. It is not necessary to plead specifically the existence of logical inferences in order to apply the resulting rule of law that determines a property interest. The trial court raised the possibility of applying the presumption during the trial, and we hold that the trial court had discretion to do so.

Relying on Fiest v. Steere, 175 Kan. 1, 259 P.2d 140 (1953), the Abrahams urge that the doctrines of adverse possession and prescriptive right have replaced the need for presumed grant, but we are not convinced of that proposition.

> The doctrine ... that the long[-]continued possession of land by one claiming as owner gives rise to the presumption of a valid conveyance to him or to the person under whom he claims,

> though ordinarily similar in its practical results to the statutes of limitation [for adverse possession], is entirely independent thereof. It involves a presumption of the rightfulness of one's possession, while the statutes of limitation are by their terms applicable only when the possession is, apart from such statutes, wrongful.

4 Herbert T. Tiffany, The Law of Real Property § 1136, at 700 (3d ed. 1975) (footnotes omitted). In New Mexico, adverse possession requires color of title supported by a writing or conveyance of some kind and payment of taxes during the period of possession, see NMSA 1978, § 37-1-22 (Repl.Pamp.1990); Currier v. Gonzales, 78 N.M. 541, 434 P.2d 66 (1967); Platt v. Martinez, 90 N.M. 323, 324, 563 P.2d 586, 587 (1977), neither of which are required to find presumption of a grant. "Where adverse possession can be shown, the doctrine of presumption of grant has no application."

Board of Trustees v. Rye, 521 So.2d 900, 906 (Miss.1988).

Therefore, a presumption of grant may be found from evidence supporting the inference (a logical presumption) of a lost or neglected grant followed by long-term, open, active, exclusive possession of property under claim of right and acquiescence or no resistance by interested parties to that possession or claim of right. Here, based on the written and signed agreements to transfer the leases, the complete performance of one of the parties[2], and the statement by Mike Abraham that the interests had been conveyed, the trial court found that the grant should have been made if it in fact had not been made. We affirm the trial court's decision on ownership.

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[2] Chemical Bank refinanced and took a mortgage on Rincon based on the agreement and alleged performance of the agreement.

El Paso's appeal of the trial court's reduction of the civil contempt award.-- Summary of proceedings below. El Paso filed its complaint for declaratory judgment in New Mexico on November 22, 1989. On June 1, 1990, Steve Abraham as personal representative of the Abraham estate (represented by Hartnett) filed suit against El Paso in the Probate Court of Harris County, Texas over the same subject matter. El Paso then filed in New Mexico a motion to enjoin prosecution in Texas, and on November 27, 1990 an injunction was entered enjoining further prosecution of the Texas action. Hartnett advised Steve Abraham to remove himself as personal representative and to procure the appointment of another personal representative. Hartnett then prepared a first amended complaint in the Texas action and applied to the Texas probate court for

permission to file it. El Paso filed a motion in New Mexico for an order to show cause, seeking to hold Hartnett in contempt for violation of the injunction. The district court, in its findings and conclusions, established that Hartnett's actions violated the injunction; that, as a direct result of Hartnett's violation of the injunction, El Paso was required to hire counsel to appear in the Texas probate court; and that El Paso had incurred $24,000 in legal fees and expenses that would not have been incurred but for Hartnett's conduct in violating the injunction. The court then ruled that a judgment would be entered in due course, concluding that Hartnett was in civil contempt of court and that El Paso should recover from Hartnett the sum of $24,000. Three months later, the court entered an

amended judgment of civil contempt (even though a judgment containing his original ruling was never entered) reducing the award to $300. The court decided that the reduced award was justified because Hartnett had done nothing directly or indirectly to advance prosecution of the Texas action after the court had originally announced its decision.

--Claims of error. El Paso contends that once it established its entitlement to compensation, the district court's discretion to fashion an appropriate award to address Hartnett's contempt was limited to awarding El Paso full compensation for expenses incurred as a result of the contempt. El Paso cites numerous cases for its position. Hartnett's answer to the claim of error is that El Paso's appeal is frivolous because a trial court always has

the power to change its interim findings until it loses jurisdiction of the case.

--Purpose of civil contempt penalties. Courts have both statutory and inherent authority to punish for contempt. NMSA 1978, § 34-1-2 (Repl.Pamp.1990); State v. Clark, 56 N.M. 123, 125, 241 P.2d 328, 329 (1952) (stating that the contempt statute is "only declaratory of the common law"). This Court discussed at length the difference between civil and criminal contempt in Jencks v. Goforth, 57 N.M. 627, 261 P.2d 655 (1953). We quoted to Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911), for the proposition that "[i]f it is for civil contempt the punishment is remedial, and for the benefit of the complainant." Jencks, 57 N.M. at 633, 261 P.2d at 659. We expanded the discussion of contempt further in State

ex rel. Apodaca v. Our Chapel of Memories of N.M., Inc., 74 N.M. 201, 392 P.2d 347 (1964). In that case, we stated:

> Judicial sanctions may ... be employed in civil contempt for either or both of two purposes: to coerce the defendant into compliance with the court's order and to compensate the complainant for losses sustained.
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> * * * * * *
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> Where the purpose is to make the defendant comply, the court's discretion is exercised in considering the character and degree of the harm threatened by the continued contumacy and whether or not the contemplated sanctions will bring about a compliance with the court's order.

Id. at 204-05, 392 P.2d at 349-50.

In In re Klecan, 93 N.M. 637, 603 P.2d 1094 (1979), we further distinguished between civil and criminal contempt actions. We stated "[c]ivil contempts are those proceedings instituted to preserve and enforce the rights of private parties to

suits and to compel obedience to the orders, writs, mandates and decrees of the court; whereas criminal contempt proceedings are instituted to preserve the authority and vindicate the dignity of the court." Id. at 638, 603 P.2d at 1095 (emphasis added). Clearly, the case before us now is one of civil contempt.

This Court has never passed on the question of whether a court has discretion not to award damages for actual losses once it has found that a violation of an injunction has occurred which resulted in actual damages in an ascertained amount. Other courts have. In Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir.1979), the Second Circuit held that in an order of civil contempt a district court was not free to withhold damages to the extent they are proven. See also W.E.

Bassett Co. v. Revlon, Inc., 435 F.2d 656, 665 n. 5 (2d Cir.1970) ("The plaintiff in a civil contempt case may recover not less than the expenses, including counsel fees, which it has incurred in enforcing the disobeyed order of the court."). The Seventh Circuit sheds further light on the question of discretion:

The type of proceeding ... determines the degree of discretion which the district court may properly exercise over the course of the proceedings.... Since the rights of the complainant, not the authority of the court, are at stake in a civil contempt proceeding, the discretion of the court over the proceeding is more limited.... If Ms. Thompson was able to establish that the defendant violated the court's order, the court would have broad discretion in fashioning an equitable remedy to ensure

future compliance, but the award of compensatory damages for past violations would not be subject to the discretion of the court.

Thompson v. Cleland, 782 F.2d 719, 721-22 (7th Cir.1986).

The First Circuit also holds that a court has no discretion in this type of proceeding. In Parker v. United States, 153 F.2d 66, 70 (1st Cir.1946), the court first analogized the imposition of a compensatory fine in civil contempt to a tort judgment for damages caused by wrongful conduct. The sanction in that case was employed to make reparation to the injured party and to restore him to the position he would have held had the injunction been obeyed. The Parker court held that the district court was not free to exercise discretion and withhold an order for damages, once

established. Id.; see also In re Grand Jury Subpoena of June 12, 1986, 690 F.Supp. 1451, 1453 (D.Md.1988) ("Once the complainant demonstrates actual losses stemming from the contumacious behaviour, the Court is not free to exercise its discretion and withhold an order awarding compensatory damages.").

Courts in the Sixth and Eighth Circuits have stated that a complainant is entitled to enforcement of court orders vindicating private rights. See L.E. Waterman Co. v. Standard Drug Co., 202 F. 167, 172 (6th Cir.1913); Enoch Morgan's Sons Co. v. Gibson, 122 F. 420, 423 (8th Cir.1903). These holdings all are in accordance with the principles of tort law--once a duty has been established (to abide by the injunction, in this case) and the defendant violates that duty (by violating the injunction), if the plaintiff proves

proximate cause of the damages (the necessity of hiring counsel to defend the lawsuit brought in violation of the injunction) and proves the amount of the damages (found to be $24,000 in this case), then the plaintiff has the right to recover those damages. We hold that once a plaintiff satisfies his burden of proving violation of a court order, proximate cause, and damages, he or she is entitled to judgment for recovery of those damages. Of course, if the damages were in the form of attorney's fees in defending against the violation, as in this case, the court has discretion in determining the reasonableness of those fees. The court additionally may award attorney's fees incurred in obtaining the order of contempt. We find that the trial court erred in failing to enter a

judgment for the amount of the damages proved.

There is another reason why the judgment of the trial court must be reversed. The court entered a judgment that was not supported by the findings of fact. Defendant Hartnett did not challenge the court's findings on appeal, and those findings shall now remain undisturbed. "[A] judgment cannot be sustained on appeal unless the conclusion upon which it rests finds support in one or more findings of fact." Thompson v. H.B. Zachry Co., 75 N.M. 715, 716, 410 P.2d 740, 742 (1966). The trial court entered judgment for only $300 after it found that El Paso's compensable damages were in the amount of $24,000. In cases tried by the court, the findings of fact by the court have the same force and effect as the verdict of a jury. Grayson v.

Lynch, 163 U.S. 468, 472, 16 S.Ct. 1064, 1066, 41 L.Ed. 230 (1896) (appeal from the Supreme Court of New Mexico). In effect, the court entered judgment notwithstanding its own verdict, and it did that without even a motion or challenge by the defendant.

The rules of civil procedure (SCRA 1986, 1-052 (Repl.Pamp.1992)) require the trial judge to make and file his decision " 'consisting of findings of such ultimate facts and conclusions of law stated separately as are necessary to support his judgment, in a single document; and that he sign and file such decision in the cause as a part of the record proper.' " Lusk v. First Nat'l Bank, 46 N.M. 445, 449, 130 P.2d 1032, 1034 (1942) (emphasis added) (emphasis in original deleted) (quoting McDaniel v. Vaughn, 42 N.M. 422, 423, 80 P.2d 417, 417 (1938)). The court could have filed an

amended decision before entry of judgment, see SCRA 1986, 1-052(B)(1)(g), but it did not do so. Under the rule, "findings or conclusions not embraced in the single document ..., even though appearing elsewhere in the record, will be disregarded...." Id. The court justified the reduction of the award in its judgment by stating that it reduced the award granted in the decision because Hartnett "has done nothing directly or indirectly to advance prosecution of the Harris County Action" since the original violation of the injunction. The court then noted that the primary purpose of its issuance of the order to show cause was to coerce compliance with the injunction. However, nothing in the court's decision states that purpose, and the damages awarded in the decision were compensatory and not punitive damages.

Therefore, we affirm the decision of the trial court in regard to the declaratory judgment, and reverse and remand the judgment for contempt for further proceedings consistent with this opinion.

IT IS SO ORDERED.

BACA and FROST, JJ., concur.

FRANCHINI, J., dissents.

MONTGOMERY, J., not participating.

FRANCHINI, Justice (dissenting).

It is my opinion that Roseline Abraham never assigned, conveyed or divested herself in any manner of the option to repurchase; and that PWG never contracted or bargained for the option.

Assignment

Although it is not affirmatively stated, I conclude that the majority agrees

that Texas law applies to the subject case. I view Prochemco in a different light than either the majority or the appellant. It seems to me that Prochemco, Inc. had a real property interest as the landowner (through its wholly-owned subsidiary) and a personal property interest as the holder of an option to extend the contract. Whether or not Prochemco's option was assignable was the controlling factor in that dichotomy. Subsequently, the wholly-owned subsidiary conveyed a 99% interest in the land to a third party. Prochemco then quitclaimed to the third party all of its right, title, and interest in the land. Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189 (Tex.Civ.App.1971), writ ref'd n.r.e. The third party asserted that since the interests were conveyed, Prochemco no longer had an option that could be exercised under

the theory that the option had run with the land.

The difference between the two cases is that the option in Prochemco was for the benefit of the land and thus was held to run with the land. The option in the instant case was for the direct benefit of the Abrahams and therefore a personal covenant. If, in fact, the Texas Court had considered the option to be conveyed along with any right title and interest that Prochemco had in the real property, then the quitclaim deed would have conveyed any rights under the option as well. The Court, however, found that it did not and that the option had survived that conveyance. The majority bases its opinion upon the assignment of the option to repurchase by the Abrahams in the transfer agreement of May 29, 1963. The general rule in Texas law is that personal

property does not pass in the assignment of an oil and gas lease unless it is expressly passed. OTC Petroleum Corp. v. Brock Exploration Corp., 835 S.W.2d 792 (Tex.Civ.App.1992) (citing Phillips Petroleum Co. v. Adams, 513 F.2d 355, 363 (5th Cir.), cert. denied, 423 U.S. 930, 96 S.Ct. 281, 46 L.Ed.2d 259 (1975)). In that agreement there is no specific conveyance of personal property or the option. From these facts, I conclude that unless expressly enumerated, a conveyance of real property (fee simple or lease) does not include options that a person may possess that are personal and do not run with the land.

The majority then extensively analyzes the conduct of Mike Abraham as to his interest in the repurchase option. I consider this to be immaterial. The party in interest in this suit is the Estate of

Roseline Abraham. Roseline was not a party to the 1964 bankruptcy plan proposed by Mike Abraham. Whatever representations made by Mike Abraham within that plan are not binding upon Roseline. At no time from 1951 through her death did Roseline expressly convey her interest in the option nor did she represent to any party that she had conveyed such an interest. The reasoning of the majority stretches to impute the conduct and intentions of all the other parties, without express or implied authority, to Roseline. There is no theory of law in Texas or New Mexico that I am aware of that would allow that result.

Intent

Texas law emphasizes, as a threshold analysis, the ambiguity of an assignment or conveyance. OTC Petroleum Corp., 835 S.W.2d at 794. "To ascertain the objective

intention of the parties, the courts examine and consider the entire writing, seeking to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." Id. (citing Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154 (1951)). Nowhere in the transfer is there an express conveyance of the option to PWG or is there any indication that PWG bargained for that conveyance. I, therefore, conclude that there was no objective intention to convey the option.

Presumed Grant

The majority refers in two instances to the "possession" of the option by PWG. That is an interesting concept. Perhaps if the Abraham's had assigned their interests in their original mineral lease agreement then there would have been an argument that

PWG possessed the option. That is not the case. In the benchmark case in New Mexico concerning presumed grant, Justice Brice references a property treatise on presumptive grant which states that "[t]his rule is based upon the assumption that if there had been no grant, the owner would have put an end to the wrongful occupation before the full period of limitation had expired." Hester v. Sawyers, 41 N.M. 497, 502, 71 P.2d 646, 651 (1937). An even more interesting question is how do you occupy an option. Roseline had no notice that PWG believed themselves to be the owner of the option. Upon notice that the conditions of the option had been met, Roseline immediately exercised her option. What action could she have been expected to take before that time? And since the option had not been bargained for or expressly

documented in any of the agreements, she could not have been expected to contest its ownership. It is significant that in applying such an extraordinary doctrine as presumed grant through prescriptive easement, Justice Brice required the prescription be "open, uninterrupted, peaceable, notorious, adverse, under claim of right, and continue for a period of ten years with the knowledge or imputed knowledge of the owner." Id. at 504, 71 P.2d at 653. The majority opinion does not demonstrate how the actions of PWG meet these requirements.

The Texas law cited by the majority is similar. It requires three elements in order for a presumption of grant to arise: (1) "long asserted and open claim, adverse to the apparent owner, ... (2) non-claim by the apparent owner, ... [and] (3)

acquiescence by the apparent owner in the adverse claim." Magee v. Paul, 110 Tex. 470, 221 S.W. 254, 256 (1920) (quoting from the majority). I can find no evidence in the record which demonstrates that PWG openly asserted a claim for any period of time. The only evidence in the record demonstrates that Roseline claimed her interest in the option as soon as she became aware that she could claim it.

I see no reason to apply the doctrine of presumed grant. Without it, there is no assignment, conveyance or any divesting action by Roseline. She exercised her option in October of 1989 and had no reason to take any other action until that time. I would reverse and set aside the judgement of the District Court because to do otherwise gives PWG a valuable interest that they never contracted or bargained for. For

all of the above reasons, I dissent.

APPENDIX - B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

January 3, 1994

No. 20,210

EL PASO PRODUCTION COMPANY, et al.,

Plaintiffs-Appellees and Cross-appellants,

vs.

PWG PARTNERSHIP, et al.,

Defendants-Appellees,

vs.

STEVE J ABRAHAM, personal representative of the estate of Roseline Abraham, and STEVE J. ABRAHAM, MICHAEL C. ABRAHAM, and DIAN ABRAHAM HENKLE, individually and as surviving children of Roseline Abraham, deceased,

Defendant-Counterclaimants-Appellants and Cross-appellees.

ORDER

This matter coming on for consideration by the Court upon appellant's motion for rehearing and brief in support thereof and

motion for leave to file amicus curiae brief, brief in support of said motion, motion to strike motion for leave to file amicus curiae brief, and brief in support of said motion and the court having considered the motions and supporting briefs and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that both motions hereby are DENIED by the Full Court, participating per request of movants.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MANDATE NO. 20,210

TO THE DISTRICT COURT sitting within and for the County of San Juan, GREETINGS;

WHEREAS, in cause number CV 89-822 your civil docket, wherein El Paso Production Company, et al. were Plaintiffs, PWG Partnership, et al. were defendants, Steve J. Abraham, et al. were defendants and

counterclaimants, declaratory judgment was entered against the Abraham family and an amended judgment was entered that reduced a sanction for contempt of court; and

WHEREAS, the cause and judgment were afterwards brought by the Abraham family into this Court for review by appeal and by plaintiffs for review by cross-appeal, whereupon such proceedings were had that on December 1, 1993, an opinion was entered affirming the declaratory judgment and reversing the amended judgment concerning sanctions for contempt of court.

NOW THEREFORE, this cause is remanded to you for entry of judgment that conforms to the findings of fact consistent and in conformity with the opinion of this Court.

WITNESS, The Hon. Richard E. Ransom, Chief Justice of the Supreme Court of the

State of New Mexico, and the seal of said Court this 3rd day of January, 1994.

_____

Kathleen Jo Gibson, Chief Clerk of the
Supreme Court of the State of New Mexico

APPENDIX - C

IN THE DISTRICT COURT OF

SAN JUAN COUNTY, NEW MEXICO

EL PASO PRODUCTION COMPANY,
AND EL PASO NATURAL GAS
COMPANY,

Plaintiffs,

MERIDIAN OIL, INC,

Involuntary Plaintiffs,

v. No. CV-89-822

PWG PARTNERSHIP, et al.,

Defendants.

ELEVENTH JUDICIAL DISTRICT

STIPULATED FINAL JUDGMENT
ON ACCOUNTING PHASE

This matter having come before the Court for trial on the merits on September 9, 1991, on the following issues, among others: (1) the date of maturity of the option to repurchase in Article VII, Section 2 of the Oil and Gas Lease Sale Agreement between Mike Abraham, et ux. and El Paso

Natural Gas Company dated September 19, 1952, referred to in this litigation as "GLA-59"; (2) if the option to repurchase were determined to have matured prior to the date of trial, the entitlement of PWG Partnership, Graham Royalty, Ltd., Prudential-Bache Energy Production, Inc., Prudential Bache Energy Income Production Partnership, IIP-10, Prudential Bache Energy Income Production Partnership, IIP-11, Prudential Bache Energy Income Production Partnership, IIIP-12, Prudential Bache Energy Income Production Partnership, IIIP-13, Prudential Bache Energy Income Production Partnership, IIIP-14, Prudential Bache Energy Income Production Partnership, IIIP-15, Prudential Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, Freeport-McMoRan Inc. (hereafter "PWG Defendants"),

to specific performance of the option to repurchase; (3) the accounting, if any, owed by Plaintiffs, El Paso Natural Gas Company, El Paso Production Company, and Involuntary Plaintiff, Meridian Oil Inc. (hereinafter "El Paso") to the PWG Defendants from and after the date of maturity of the option to the date of judgment herein; and (4) the damages, if any, to be awarded to PWG Defendants for any period between the date of maturity of the option and the date of judgment.

At the commencement of the trial September 9, 1991, the Court announced its ruling in open court concerning the meaning of certain language in the repurchase option. El Paso and the PWG Defendants have agree, as between them, to the entry of this Stipulated Partial Judgment adjudicating the date of maturity of the option to repurchase

in accordance with the ruling of the Court. El Paso and the PWG Defendants have further agreed to settle as between themselves all further issues in controversy between them in this litigation, pursuant to the terms of a letter agreement dated September 18, 1991 which El Paso and the PWG Defendants have agreed shall remain confidential.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. As between the PWG Defendants and El Paso, the conditions necessary for maturation of the option to repurchase contained in Article VII, Section 2 of GLA-59 occurred as of January 15, 1989, and the option to repurchase was subject to exercise by the PWG Defendants at that time. This does not apply as between El Paso and Defendants Steve Abraham as Personal Representative of the Estate of Mike

Abraham, Roseline Abraham, J.R. and Dorothy Abraham (hereinafter "Abraham Defendants").

2. El Paso and the PWG Defendants have released, and by agreement to entry of this Stipulated Partial Judgment do release one as against the other, and the Court therefore hereby dismisses with prejudice, all disputes, claims, and defenses asserted in this litigation by El Paso against the PWG Defendants and the PWG Defendants against El Paso. This release and dismissal includes any and all claims through September 30, 1991, asserted by the PWG Defendants in this litigation against El Paso for an accounting or concerning the methodology utilized by El Paso in accounting for production from the GLA-59 property, including without limitation claims set forth in the pleadings, pretrial order, scheduling orders, or in arguments to

the Court relating to: (1) accounting for volumes, revenues, and costs; (2) allocation of unit production; and (3) pricing.

3. El Paso and the PWG Defendants reserve, save, and maintain all legal theories, claims, rights to court costs, and defenses as against all claims or defenses by the Abraham Defendants.

4. Upon entry of this Stipulated Final Judgment on Accounting Phase, all issues as to all parties have been adjudicated.

_____
DISTRICT JUDGE PRO TEMPORE

APPROVED:

/s/_____
Attorney for Plaintiffs

/s/_____
Attorney for New PWG Partnership
and Graham Royalty Limited

/s/_____
Attorney for Freeport McMoRan, Inc.

APPENDIX - D

IN THE DISTRICT COURT OF SAN JUAN COUNTY, NEW MEXICO

No. CV 89-822

EL PASO PRODUCTION COMPANY, NATURAL GAS COMPANY,

Plaintiffs,

MERIDIAN OIL INC.,

Involuntary Plaintiff,

vs.

PWG PARTNERSHIP, GRAHAM ROYALTY, Ltd., PRUDENTIAL-BACHE ENERGY PRODUCTION INC., PRUDENTIAL-BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIP-10, PRUDENTIAL-BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIP-11, PRUDENTIAL-BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIIP-12, PRUDENTIAL-BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIIP-13, PRUDENTIAL BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIIP-14,

Entered in Open Courtat 4:30 o'clock p.m., this 18th day of September, 1991.

Leon Karelitz
District Judge Pro Tempore

PRUDENTIAL-BACHE
ENERGY INCOME PRODUCTION
PARTNERSHIP IIIP-15,
PRUDENTIAL-BACHE ENERGY
INCOME LIMITED PARTNERSHIP
IVP-16, PRUDENTIAL-BACHE
ENERGY INCOME LIMITED
PARTNERSHIP IVP-17, FREEPORT-
McMoRAN INC., ROSELINE
ABRAHAM, STEVE J. ABRAHAM
as Personal Representative
of Mike Abraham, Deceased,
J. R. ABRAHAM, and
DOROTHY ABRAHAM,

Defendants.

JUDGMENT ON OWNERSHIP PHASE

This case was tried to the Court, sitting without a jury, and the Court thereafter on August 20, 1991 having filed its Decision on Ownership Phase, it is

ORDERED, ADJUDGED AND DECREED, that:

1. Defendants PWG Partnership, Graham Royalty, Ltd., Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income

Production IIIP-12, Prudential-Bache Energy Income Production Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15, Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, and Freeport-McMoran Inc. have lawful possession and since 1973 have had and continue to enjoy perfect and full legal title to all Seller's interests in GLA-59, including but not limited to the option to repurchase mentioned in Article VII, Sec. 2 therein, applicable to the leases hereinafter in this decretal clause recited, and to the oil and liquid hydrocarbons in and that may be extracted from such leases: SF 079380, SF 079381, SF 079382, SF 079383, SF 080713B, SF 080714A, NM 012292, SF 079002, NM 012735,

and SF 079012. "GLA-59" is that certain Oil and Gas Lease Agreement dated September 19, 1952, entered into between Mike Abraham and defendant Roseline Abraham, his wife, as Seller, and plaintiff El Paso Natural Gas Company. All aforementioned leases are United States Government Oil and Gas Leases; leases numbered SF 079380 and SF 079381 are situated in San Juan County, New Mexico, and all eight additional lease are situated in Rio Arriba County, New Mexico; all as more fully described hereafter:

Lease No.	Description	Acreage	Gross	County
SF 079380	T32N-R8W, Section 14: S/2		320.00	San Juan
	Section 15: SE/4		160.00	
	Section 22: All		640.00	
	Section 23: All		640.00	
			1,760.00	
SF 079381	T32N-R8W, Section 24: E/2		320.00	San Juan
	Section 25: E/2		320.00	
	Section 33: E/2		320.00	
	Section 34: All		640.00	
	Section 35: All		640.00	
			2,240.00	
SF 079382	T30N-R7W, Section 22: E/2E/2		160.00	Rio Arriba
	Section 23: All		640.00	
	Section 24: All		640.00	
	Section 25: All		640.00	
			2,080.00	

SF 079383	T30N-R7W, Section 26: All	640.00	Rio Arriba
	Section 27: E/2	320.00	
	Section 34: All	640.00	
	Section 35: All	640.00	
		2,240.00	
SF 080713B	T30N-R6W, Section 14: All	640.00	Rio Arriba
	Section 15: S/2, S/2 NW/4	400.00	
		1,040.00	
SF 080714A	T30N-R6W, Section 10: Lots 1-5, N/2, W/2 SW/4	518.69	Rio Arriba
	Section 15: Lots 1, 2, NE/4 NE/4, S/2 NE/4, NW/4 NW/4	223.96	
		742.65	
NM 012292	T30N-R6W, Section 3: All	640.48	Rio Arriba
SF 079002	T30N-R6W, Section 7: N/2	320.00	Rio Arriba
	Section 8: N/2, SE/4	480.00	
		800.00	
NM 012735	T30N-R6W, Section 6: All	639.40	Rio Arriba
SF 079012	T30N-R6W, Section 4: All	639.40	Rio Arriba
	TOTAL ACREAGE	12,822.37	

2. Neither defendant Roseline Abraham, defendant Steve J. Abraham as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham, defendant Dorothy Abraham, plaintiff El Paso Production Co., plaintiff El Paso Natural Gas Co. nor Involuntary Plaintiff Meridian Oil Inc. has any right, title, interest,

claim demand or lien in, to or upon any of the Seller's interests under GLA-59 in any of the ten leases enumerated in Decretal Clause No. 1 above; and neither Mike Abraham, deceased, defendant Roseline Abraham, Defendant Steve J. Abraham as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham nor defendant Dorothy Abraham has had any such right, title, interest, claim, demand or lien therein or thereto since before September, 1964.

3. The foregoing title of defendants PWG Partnership, Graham Royalty, Ltd., Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income Production IIIP-12, Prudential-Bache Energy Income Production

Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15, Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, and Freeport-McMoran Inc., in and to all Seller's interests in GLA-59, enumerated in Decretal Clause No. 1 above, be, and the same hereby is, forever quieted and set at rest against the claims, demands and pretensions of defendant Roseline Abraham, defendant Steve J. Abraham as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham, defendant Dorothy Abraham, plaintiff El Paso Production Co., plaintiff El Paso Natural Gas Company and Involuntary Plaintiff Meridian Oil Inc., and each of them, and of all persons claiming or to claim from or

through them, or any of them, and defendant Roseline Abraham, defendant Steve J. Abraham, as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham, defendant Dorothy Abraham, plaintiff El Paso Production Co., plaintiff El Paso Natural Gas Co. and Involuntary Plaintiff Meridian Oil Inc., and each of them be, and they hereby are, barred and forever estopped from having or claiming to have any right, title, interest, claim, demand or lien whatsoever in, to or upon said Seller's interests in GLA-59, or any part thereof, adverse to defendants PWG Partnership, Graham Royalty, Ltd., Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income Production IIIP-12, Prudential-Bache Energy Income

Production Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15, Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, and Freeport-McMoran Inc.; and the lawful possession and full perfect legal title of the defendants first hereinabove named in this decretal clause in and to all Seller's interests in GLA-59, as enumerated in Decretal Clause No. 1 above, and every part thereof, be, and the same hereby are, established against the adverse claims of defendant Roseline Abraham, defendant Steve J. Abraham as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham, defendant Dorothy Abraham, plaintiff El Paso Production Co., plaintiff El Paso Natural Gas Company and

Involuntary Plaintiff Meridian Oil Inc., and each of them.

4. As between themselves, defendant PWG Partnership owns an undivided 33.3325 percent in and to the Seller's interests in GLA-59, enumerated in Decretal Clause No. 1 above; defendant Graham Royalty, Ltd. and defendants Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income Production IIIP-12, Prudential-Bache Energy Income Production Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15, Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, own an

undivided 33.3325 percent; and defendant Freeport-McMoran Inc., owns the remaining undivided 33.3350 percent.

5. During the course of this proceeding, defendant Freeport-McMoran Inc. duly and lawfully sold and conveyed its undivided 33.3350 percent in and to the Seller's interests in GLA-59, enumerated in Decretal Clause No. 1 above, to plaintiff El Paso Production Co. (to the extent of an 85 percent interest) and to Meridian Oil Production Inc., affiliated with Involuntary Plaintiff Meridian Oil Inc. (to the extent of 15 percent).

6. All right, title and interest of defendant J. R. Abraham and defendant Dorothy Abraham, his wife, in an to all Seller's interests in GLA-59, as enumerated in Decretal Clause No. 1 above, in and to the United States Government Oil and Gas

Leases SF 079382 and SF 079383, be, and they hereby are, divested from defendant J. R. Abraham and defendant Dorothy Abraham, his wife, and all such right, title and interest in and to the Seller's interests in GLA-59, as enumerated in Decretal Clause No. 1 above, in and to such leases SF 079382 and SF 079383 be, and they hereby are, vested in defendant PWG Partnership (an undivided 33.3325 percent), in defendants Graham Royalty, Ltd. and Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income Production IIIP-12, Prudential-Bache Energy Income Production Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15,

Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17 (an undivided 33.3325 percent), and in plaintiff El Paso Production Co. (85 percent of an undivided 33.3350 percent) and Meridian Oil Production Inc. (15 percent of an undivided 33.3350 percent). This decretal clause explicitly has no reference to the overriding royalty interest in leases SF 079382 and SF 079383 owned by defendant J. R. Abraham and defendant Dorothy Abraham or either of them.

7. This judgment is not final; this judgment shall be final only upon entry hereafter of a Stipulated Final Judgment on Accounting Phase.

_____

Leon Karelitz
District Judge Pro Tempore

Noted as to form:

/s/

/s/

/s/

/s/

APPENDIX - E

EXCERTS FROM
DECISION OF OWNERSHIP PHASE
(Filed August 10, 1991)

"Pursuant to Order Confirming Trial Setting and Settling Trial Procedure entered on June 14, 1991, all issues as to the ownership of GLA-59 rights (remaining after the court's disposition of summary judgment motions) were tried to the court, without a jury, commencing on July 8, 1991. On July 23, 1991, after all parties had rested and closed on the ownership issues, and after hearing and reading argument of all parties, the court gave, at length, to counsel and the record an oral opinion containing evidentiary and ultimate findings, its conclusions of law and reasoning. Having now also considered the requested findings of fact and conclusions of law submitted by

the parties, the court makes and states its findings and conclusions as follows:"

FINDINGS OF FACT

*****

"19.c. . . . On May 29, 1963, . . . Mike Abraham owned three things in the interests assigned to El Paso in the GLA-59 leases: First, the oil; second, the liquid hydrocarbons; and third, the right to buy back the gas production. The latter right (apart from any question of its characterization as a covenant running with the land) is a right to gas, a real right, is clearly assignable and also divisible under GLA-59 . . ."

*****

"20 . . . The conveyance listed within the oil and gas properties, which were being conveyed, six leases,

by number as follows: SF 080713B, SF 080714A, NM 012282, SF 079002, NM 012735, and SF 079012 . . ."

"21. Omitted from the conveyance of June 3, 1963 were leases SF 079380 and SF 079381; . . . Also omitted from that conveyance were . . . leases SF 079382 and SF 079383 . . ."

"32. . . . the PWG group has had long-continued possession and use of the seller's interests under GLA-59."

"43 . . . Roseline Abraham was not a named party to the bankruptcy proceedings."

*****

CONCLUSIONS OF LAW

*****

"3. The evidence affords a sufficient basis for, if it does not require, the court to invoke the policy presumption

of a grant into Rincon from Mike Abraham and defendant Roseline Abraham . . . of the seller's interests in GLA-59, specifically, the whole of the option to repurchase promised to be granted in Article VII, Sec. 2 and the oil and liquid hydrocarbons in leases SF 079380, SF 079381, SF 079382 and SF 079383. Such a conveyance might have been executed and its execution would be a solution of the difficulties arising from the nonexecution. The circumstances supporting the presumption of a grant, to quiet the possession of the PWG group, are here very cogent and full. The fact that Mike Abraham and Defendant Roseline Abraham in 1963 made one deed conveying some of the seller's interest under GLA-59 to Universal

Minerals, Inc., does not repel the presumption that they made another covering other seller's interests under GLA-59 to Rincon; the presumption assumes that all that might lawfully have been done to perfect legal title was in fact done, and in the form prescribed by law.

"4. The PWG group has lawful possession and has acquired by the 1973 conveyances form Rincon perfect title to all seller's interests in GLA-59, including but not limited to the option to repurchase mentioned Article VII, Sec. 2 therein, applicable to the leases hereinafter in this Conclusion recited, and to the oil and liquid hydrocarbons in and that may be extracted from such leases: SF 079380, SF 079381, SF

079382, SF 079383, SF 080713B, SF 080714A, NM 012292, SF 079002, NM 012735, and SF 079012."

APPENDIX - F

STATUTES

30 U.S.C. § 181. **Lands subject to disposition; persons entitled to benefits;**

"Deposits of . . . oil . . . or gas, and lands containing such deposits owned by the United States . . . Shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States . . ."

30 U.S.C. § 189. Rules and regulations . . .

"The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any

structure, or oil and gas field, for the purpose of this chapter. . ."

(Feb. 25, 1920, c. 85, § 32, 41 Stat. 450)

30 U.S. C. § 226 **Lease of oil and gas lands.**

"(a) Authority of Secretary

All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.

*****

"(j) Cooperative or unit plan; authority of Secretary of the Interior to alter or modify; communitization or drilling agreements; term of lease, conditions; Secretary to approve operating, drilling, or development contracts, and subsurface storage

For the purpose of more properly conserving the natural resources of any oil or gas pool, field, or like area, or any part thereof (whether or not any part of said oil or gas pool, filed, or like area, is then subject to any cooperative or unit plan of development or operation) lessees thereof and their representatives may unite with each other or jointly or separately under others, in collectively adopting and operating under a cooperative unit plan of developtment or operation of such pool, field, or like area, or any part thereof, whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. The Secretary is thereunto authorized, in his

discretion, with the consent of the holders of leases involved, to establish, alter, change, or revoke drilling, reproducing, rental, minimum royalty, and royalty requirements of such leases and to make such regulations with reference to such leases, with like consent on the part of the lessees, in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of the public interest. The Secretary may provide that oil and gas leases hereafter issued under this chapter shall contain a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under

which such lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States . . .

*****"

ACT OF AUGUST 8, 1946

"Sec. 5 The Act is hereby amended by adding a new section to read as follows;

Section 17. (b) For the purpose of more properly conserving the natural resources of any oil or gas pool, field, or like area, or any part thereof (whether or not any part of said oil or gas pool, field, or like area, is then subject to any cooperative or unit plan of development or operation), lessees thereof and their representatives may

unite with each other, or jointly or separately with others, in collectively adopting and operating under a cooperative or unit plan of development or operation of such pool, field, or like area, or any part thereof, whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. The Secretary is thereunto authorized, in his discretion, with the consent of the holders of leases involved, to establish, alter, change, or revoke drilling, producing, rental, minimum royalty, and royalty requirements of such leases and to make such regulations with reference to such leases, with like consent on the part of the lessees, in connection with the

institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of the public interest. The Secretary may provide that oil and gas leases hereafter issued under this Act shall contain a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under which such lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States.

"Any plan authorized by the preceding paragraph, which includes lands owned by the United States, may, in the discretion of the Secretary, contain a provision whereby authority

is vested in the Secretary of the Interior, or any such person, committee, or State or Federal officer or agency as may be designated in the plan, to alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under such plan. All leases operated under any such plan approved or prescribed by the Secretary shall be excepted in determining holdings or control under the provisions of any section of this Act.

*****"

REGULATIONS

43 C.R.R. § 3186.1 **Model onshore unit agreement . . .**

*****

"8. RIGHTS AND OBLIGATIONS OF UNIT OPERATOR. Except as otherwise specifically provided herein, the exclusive right, privilege, and duty of exercising any and all rights of the parties hereto which are necessary or convenient for prospecting for, producing, storing, allocating, and distributing the unitized substances are hereby delegated to and shall be exercised by the Unit Operator as herein provided. . .

*****"

IN EFFECT IN 1952 AND 1953

"COOERATIVE CONSERVATION PROVISIONS

192.20 **Cooperative or unit plans.** The act authorizes lessees and their representatives to unite with each other, or jointly or separately with others, in collectively adopting and

operating under a cooperative or unit plan of development or operation of any oil or gas pool, field, or like area, or any part thereof (whether or not any part of such pool, field, or like area is then subject to any coopertaive or unit plan of development or operation). The agreement must be for the purpose of more properly conserving the natural resources of any such oil or gas pool, field or area covered thereby and must be determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. The Secretary, with the consent of the lessees, is authorized to establish, alter, change, or revoke drilling, producing, rental, minimum royalty, and royalty requirements of

the leases and to make such regulations with reference to such leases as he may deem necessary or proper to secure the protection of the public interest. All leases committed to any unit or cooperative plan approved or prescribed by the Secretary of the Interior shall be excepted in determining acreage charges.

§ 192.21 **Application for approval of plan.** The procedure in obtaining approval of a cooperative or unit plan of development including suggested text of an agreement acceptable to the Department is contained in 30 C.F.R. Part. 226, 'Unit or Cooperative Agreement'. All applications to unitize and all documents incident thereto shall be filed in the office

of the oil and gas supervisor, Geological Survey, for the region in which the unit area is situated."

APPENDIX - G

The following is the pertinent excerpt from the conveyance of Rincon to PWG:

"6. An undivided 50% leasehold interest in that certain Oil and Gas Lease, Serial No. SF 080713-B dated from the United States of America, as Lessor to Oscar Abraham, as Lessee covering the following described lands:

Township 30 North, Range 6 West, N.M.P.M.
Section 14: All
Section 15: S/2, S/2 NW/4
Containing 1,040.00 acres, more or less.

Net Interest in Production:
W.I.
.41250000

7. An undivided 50% leasehold interest in that certain Oil and Gas Lease, Serial No. SF 080714-A dated from the United States of America, as Lessor to Oscar Abraham, as Lessee covering the following described lands:

Township 30 North, Range 6 West, N.M.P.M.

Section 10: Lots 1, 2, 3, 4, 5, N/2, W/2 SW/4
Section 15: Lots 1 and 2, S/2 SE/4, NE/4 NE/4

NW/4 NW/4
Containing 742.65 acres, more or less

*****

Properties No. 5, 6, and 7 are subject to the terms and provisions of an Oil and Gas Lease Sale Agreement between Mike Abraham and El Paso Natural Gas Company dated September 19, 1952 wherein Mike Abraham, et ux, assigned their interest therein to El Paso Natural Gas Company subject to (a) the reservation of all oil rights; (b) the reservation of all gaseous liquids; and (c) the terms and provisions of that certain Agreement between Mike Abraham and General American Oil Company of Texas dated August 24, 1951."

APPENDIX - H

The following excerpts are from testimony presented at the trial:

(Witness) W.H. Hudson:

TR. 1364;

"Q. Now, you've said that your interest would have been to get as much as you could in, because any value in equity in the reorganized company, in excess of the loan, you would be able to share in, as I understand it, because you would have an ownership position in that reorganized (country) -- company.

Q. Do I understand you there?

A. That is correct.

Q. Would Ms. Fuller, Mr. Avant, Mr. Barnett also have been aware of that interest of your company?

A. Absolutely.

Q. They would be aware that it's your intention to make sure that everything that was supposed to be in that reorganized company in fact was in it?

A. That is correct.

Q. And in this transaction specifically, the list of properties, of course, is a lengthy one. Would Ms. Fuller have had the initial responsibility for putting that together?

A. In my estimation, yes."

TR 1398;

"Q. I believe that you answered Mr. Slade's questions, and I want to make sure I understand this, that the objective of getting the

Abraham properties into Universal Minerals, later named "Rincon," was complied with the Exhibit 174?

A. Correct.

Q. And that if anything that was left out that was ever called to your attention, and nothing was done about it, it would have been because it was of no value, or it was de minimums; is that correct?

A. That it correct.

(Witness) Billie Fuller:

TR 1414;

Q. But let me ask you this questions, Ms. Fuller: The last sentence there in the third paragraph states that to the best of your knowledge, a request for

assignment will not be made at this time. Do you have any recollection of a request for assignment ever being made after that?

A. No, sir.

Q. All right. The last sentence states, (quote) "The records show that the entire interest in these four leases is held by El Paso Natural Gas Company" (end of quote). Do you recall taking -- taking any action pursuant to that statement, after you received the letter?

A. No. sir.

Rincon correspondence dated November 18, 1993:

Exhibit 41;

1126 MERCANTILE SECURITES BUILDING
DALLAS 1, TEXAS
18 November 1963

Mr. Henry Samaniego, Supervisor
Record Section - Land Department
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas

Dear Mr. Samaniego:

Thank you for your letter of November 15, 1963.

We enclosed electrostat copy of a fully executed copy of the mortgage and all of its exhibits by and between Rincon Oil & Gas Corporation to Chemical Bank New York Trust Company. We were under the impression that the attorneys had furnished this instrument to you, an regret that you have been delayed in receiving it.

None of the interests in SJ 32-8 Unit were assigned so far as we can determine. It was the intent that all

of Mike Abraham's properties be assigned, but this was overlooked in some way. To the best of my knowledge, request for assignment will not be made at this time.

There is still pending for approval before the BLM an assignment of a working interest in SF 079007 from Abraham to Universal, as wellaas an assignment of a 25% interest in Lot 1 (NW1/4NW1/4) of Section 18, 32N, 13W, under the same lease from the Peoples State Bank of Ellinwood, Kansas. If there are other federal leases on wich we have not furnished copies of the approved assignments, we do not know which ones they might be, as we thought all had been furnished except SF 079007. If you have knowledge of

any leases on which assignments are lacking, will you please advise.

Very truly yours,

RINCON OIL & GAS CORPORATION

/s/
Billie Fuller

BF..s
encl."

El Paso Natural Gas Company correspondence:

Exhibit 49;

"May 1, 1964

Rincon Oil & Gas Corporation
1126 Mercantilo Securities Building
Dallas 1, Texas

Attention: Mr. J.A. Barnett

Re: San Juan 30-6 Unit,
Tracts #9 and #10
Rio Arriba County, New Mexico

Gentlemen:

Please refer to your letter of April 13, 1964, concerning payout statements that you are receiving

convering the captioned tracts. Our records indicate that you do not own an interest in these tracts; however, since costs and production attributable to these tracts are included in the payout account contemplated by the June 22, 1951 Agreement between Mike Abraham and General American, it is necessary that we show these tracts on the statement. Attached is a copy of the June 22, 1951 Agreement.

Yours very truly,

Henry Samaniego
Supervisor
Record Section
Land Department

HS:DI:vkr
Attachment

NM-2104
NM-2105

APPENDIX - I

New Mexico Statutes

1. NMSA 1978:

"40-3-13. Transfers, conveyances, mortgages and leases of real property; when joinder requires.

A. Except for purchase-money mortgages and except as otherwise provided in this subsection, the spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey, or mortgage any interest in community real property and separate real property owned by the spouses as co-tenants in joint tenancy or tenancy in common. . .

Any transfer, conveyance, mortgage or lease or contract to transfer, convey, mortgage or lease any interest in the community real

property or in separate real property owned by the spouses as co-tenants in joint tenancy or tenancy in common, attempted to be made by either spouse alone in violation of the provisions of this section shall be void and of no effect, except that either spouse may transfer, convey, mortgage or lease directly to the other without the other joining therein.

Except as provided above, either spouse may transfer, convey, mortgage or lease separate real property without the other's joinder. . ."

*****

2. NMSA 1953:

"57-4A-7. Transfers, conveyance, mortgages and leases of real property - When joinder required. - A. Except for purchase-money mortgages and

except as otherwise provided in this subsection, the spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey or mortgage any interest in community real property and separate real property owned by the spouses as co-tenants in join tenancy or tenancy in common. . .

Any transfer, conveyance, mortgage or lease or contract to transfer, convey, mortgage or lese any interest in the community real property or in separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common, attempted to be made by either spouse alone in violation of the provisions of this section shall be void and of no effect, except that either spouse

may transfer, convey, mortgage or lease directly to the other without the other joining therein.

B. Nothing in this section shall affect the right of one of the spouses to transfer, convey, mortgage or lease, or contract to transfer, convey, mortgage or lease, any community real property, or separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common, without the joinder of the other spouse, pursuant to a validly executed and recorded power of attorney as provided in section 70-1-6 NMSA 1953."

3. 70-1-6:

"**Powers of attorney and revocations thereof to be acknowledged and recorded.** - All powers of attorney

or other writings containing authority to convey real estate, as agent or attorney of the owner of the same, or to execute, as agent for another, any conveyance of real estate, or by which real estate may be affected in law, or equity, shall be acknowledged, certified, filed and recorded, as other writings conveying or affecting real estate are required to be acknowledged . . ."

Supreme Court, U.S.
FILED
MAY 18 1994
OFFICE OF THE CLERK

No. 93-1704

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

STEVEN J. ABRAHAM, Personal Representative of the Estate of Roseline Abraham, *et al.*,
Petitioners,

v.

PWG PARTNERSHIP, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Mexico

BRIEF OF RESPONDENTS IN OPPOSITION

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Dated: May 18, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

PARTIES TO THE PROCEEDING

PWG Partnership ("PWG"), El Paso Production Company, and Meridian Oil Inc. (collectively "Respondents") submit this Brief in Opposition to the Petition for Writ of Certiorari on behalf of Respondents. Prior to its dissolution, PWG Partnership was a New Mexico partnership and did not have any publicly traded stock. El Paso Production Company and Meridian Oil Inc. are subsidiaries of Burlington Resources Inc.

A. PWG Group.

Graham Royalty Ltd., Prudential Bache Energy Production Inc., Prudential Bache Energy Income Production Partnership IIP-10, Prudential Bache Energy Income Production Partnership IIP-11, Prudential Bache Energy Income Production Partnership IIIP-12, Prudential Bache Energy Income Production Partnership IIIP-13, Prudential Bache Energy Income Production Partnership IIIP-14, Prudential Bache Energy Income Production Partnership IIIP-15, Prudential Bache Energy Income Limited Partnership IVP-16, and Prudential Bache Energy Income Limited Partnership IVP-17 (collectively "Pru-Bache Entities"), and PWG Partnership (collectively "PWG Group"), composed a group of defendants with common ownership interests in the GLA-59 properties. In November 1993, after judgment in the trial court, the Pru-Bache Entities transferred their interests in the oil and gas properties at issue and, therefore, have no interest in the outcome of the Petition. Meridian Oil Production, Inc. acquired the interests formerly owned by the Pru-Bache Entities in February 1994.

B. El Paso Group.

Petitioners' List of Parties incorrectly describes the corporate ownership of, and relationships between, El Paso Production Company, El Paso Natural Gas Company, and Meridian Oil Inc. El Paso Natural Gas Com-

pany was spun off by Burlington Resources Inc. on June 30, 1992. El Paso Natural Gas Company has been a publicly held corporation traded on the New York Stock Exchange since March 12, 1994. El Paso Production Company and Meridian Oil Inc. are wholly-owned subsidiaries of Meridian Oil Holding Inc. Since the sale of El Paso Natural Gas Company, there has been no corporate affiliation between El Paso Natural Gas Company and any of the Respondents. El Paso Production Company and Meridian Oil Inc. have assumed all of the rights and obligations of El Paso Natural Gas Company with respect to the property and the litigation. Meridian Oil Inc. managed the oil and gas leases at issue as agent for the lessee/owner, El Paso Production Company.

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IN THE

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STEVEN J. ABRAHAM, Personal Representative of the Estate of Roseline Abraham, *et al.*,
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v.

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Mexico

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BRIEF OF RESPONDENTS IN OPPOSITION

INTRODUCTION

This case is a paradigm for the denial of certiorari. The controversy involves no conflict between decisions of the New Mexico Supreme Court and other United States courts of appeals or state courts of last resort as to federal or nonfederal mattters; involves no constitutional issues; and involves no important issues already pending before the Court. Indeed, there are no special or important reasons to grant certiorari. Respondents, therefore, request that this Court deny the Petition for Writ of Certiorari seeking review of the New Mexico Supreme Court's opinion in this case. That opinion, issued on De-

cember 3, 1993, is reported at 866 P.2d 311 (N.M. 1993).[1]

STATEMENT OF THE CASE

Respondents adopt the statement of the facts contained in the New Mexico Supreme Court's opinion.[2] In sum, this case involved competing claims to ownership of the lessee's interests in federal oil and gas leases under a September 9, 1952 Oil and Gas Lease Sale Agreement known as "GLA-59." The signatory parties to GLA-59 were El Paso Natural Gas Company and Mike and Roseline Abraham (husband and wife, sometimes referred to herein as Seller), both of whom are now deceased. Under GLA-59, the Seller agreed to sell federal oil and gas leases to El Paso Natural Gas Company, while reserving interest in the oil and liquid hydrocarbons under the leases. The Seller also reserved the right to repurchase the leases after El Paso Natural Gas Company had produced a certain amount of gas from the properties.

The case was divided into three phases: (1) adjudication of the enforceability of GLA-59 by Roseline Abraham or the PWG Group as successor-in-interest against claims that the rule against perpetuities, merger, and other common law doctrines applied; (2) an ownership trial to determine whether the PWG Group or Roseline Abraham was the owner of the rights of the Seller under GLA-59, including the option to repurchase; and (3) a trial on accounting issues to determine whether the option to repurchase had matured.[3] In the second phase, the

---

[1] Citations to the Petition for Writ of Certiorari are identified as "Petition" followed by a reference to a page number, as appropriate. Citations to the transcript of record are identified as "T.R." followed by a reference to a page number, as appropriate. Relevant sections of the transcript of record are reproduced in the Appendix attached hereto.

[2] *See* Petition Appendix at A 2-10.

[3] Petitioners include at least one misstatement in their Statement of the Case. *See* Petition at 9. Petitioners assert that the date of

trial court heard testimony from dozens of witnesses and reviewed hundreds of exhibits. The evidence at trial retraced the nearly fifty-year history of the GLA-59 leases from the date of their issuance by the United States in the late 1940's and early 1950's up through the period shortly before suit in which PWG and Roseline Abraham (and the Estate of Mike Abraham) made their competing claims to ownership of the rights of the Seller under GLA-59.

The trial court quieted title in the PWG Group to the interests in the GLA-59 leases and held that: (1) PWG owned the option to repurchase the Seller's interest under GLA-59; and (2) Petitioners had no rights, title, interest, or claim to or upon the Seller's interest under GLA-59. The New Mexico Supreme Court affirmed the trial court's decision holding that under New Mexico law, the Abrahams were presumed to have granted their rights, title, interest, and claims in the interests of the GLA-59 leases.[4]

---

maturation of the repurchase option is January 15, 1989. The only source for the maturation date is the stipulation between El Paso and PWG, which applies only to those parties. At a minimum, Petitioners' statement with respect to maturation of the option is a red herring. Under Petitioners' theory of the case—that the option was a personal contract incapable of assignment, *see* Petition Appendix at A 18-19, the option expired upon the death of Mike Abraham or Roseline Abraham. *See In re Estate of Maguire*, 204 Kan. 686, 466 P.2d 358 (1970).

[4] The New Mexico Supreme Court also reversed and remanded the trial court's decision reducing the amount of the civil contempt award against Thomas R. Hartnett, III, for violating the court's injunction against Hartnett's further prosecution of a vexatious suit in Texas over the same subject matter. Neither Petitioners nor their attorney seek review of the contempt aspect of the New Mexico Supreme Court's decision. *See* Petition Appendix at A 35-48.

REASONS FOR DENYING THE WRIT

Petitioners have offered no convincing reason why this Court should become involved in a state-law property dispute. Having failed to carry the day in the New Mexico state courts, Petitioners have concocted a series of federal questions, none of which was properly preserved below and none of which is substantial. The petition should be denied.

I. PETITIONERS FAILED TO RAISE THEIR FEDERAL CLAIMS BELOW

Petitioners did not adequately present their federal claims in the New Mexico courts. To the extent that Petitioners raised these issues below they were presented too late to preserve the issues for review by this Court. To begin with, Petitioners' Question For Review I was never presented in any form in the courts below. If Petitioners had presented their federal claim below, the New Mexico courts would have been able to clarify the judgment or otherwise reemphasize what everyone already understands—*i.e.*, that the judgment was intended only to establish the rights of the private parties before the court in the GLA-59 leases, and has no effect on the rights of the United States.

Petitioners concede that they suggested Question For Review II for the first time in the motion for rehearing in the New Mexico Supreme Court.[5] Under New Mexico practice, parties may not raise new issues at the rehearing stage.[6] Consistent with this practice, the New Mexico Supreme Court did not address any federal statutory ques-

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[5] *See* Petition at 12 (quoting motion for rehearing) (" 'This issue is raised for the first time on this motion for reconsideration.' ").

[6] *State v. Curlee*, 98 N.M. 576, 579, 651 P.2d 111, 114 (Ct. App.) ("It has been an unwavering rule in this jurisdiction for almost 70 years that new points may not be presented in a petition for rehearing."), *cert. denied*, 98 N.M. 590, 651 P.2d 636 (1982).

tion—instead merely denying rehearing summarily.[7] On such facts, this Court repeatedly has held that federal questions first presented to the highest state court on a petition for rehearing come too late for consideration by this Court, absent circumstances not present in this case.[8]

Recognizing the problem with their tardy injection of a new issue into the case, Petitioners in the court below argued that the purported conflicts with "paramount federal law" deprived the New Mexico state courts of *jurisdiction*. But this is absurd on its face. Petitioners never argued that the New Mexico courts were barred from determining who has title to the option. Nor could they have done so, since it is well established that state law governs transfers of federal mineral leases among private parties,[9] and that, while the Secretary of the Interior must approve transfers of interest in leases, any private dispute over the validity or effect of such a transfer must first be resolved in court.[10]

What Petitioners argued on rehearing below, and again here, is that the doctrine of presumed grant is not a proper basis on which to adjudicate interests in federal mineral leases.[11] Whether valid or not, that argument, on

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[7] *See* Petition Appendix at B 1-4. New Mexico's Rules of Appellate Procedure preclude a party from responding to a motion for rehearing unless the motion is granted. *See* N.M. Sup. Ct. R. Ann. 1986, 12-404. The New Mexico Supreme Court denied Petitioners' motion for rehearing without a response from the prevailing appellees.

[8] *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975).

[9] *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68-71 (1966).

[10] *Id.* at 70 n.8.

[11] *See* Petition at i, 12, 16.

its face, has nothing to do with the *jurisdiction* of the courts below to decide this property dispute. At most, what Petitioners are saying is that federal law preempts one particular aspect of state property law. That is an argument they were obligated to raise and properly preserve in the courts below.

Petitioners nowhere presented in the courts below the bulk of their due process claims as presented in Question For Review III. The only due process issue presented in the appeal to the New Mexico Supreme Court, or in the rehearing motion, had to do with reliance on the conduct of Mike Abraham as evidence supporting the conclusion that his wife, Roseline Abraham, had transferred her rights to the option. Petitioners now seek to inflate this contention by adding in a range of state-law claims that they never stated in constitutional terms until they filed the petition in this Court. Petitioners' attempt to manufacture a federal case to support review by certiorari after the New Mexico Supreme Court rendered its opinion is too late and too little to warrant this Court's exercise of jurisdiction over the matter.

II. EVEN IF PETITIONERS' CLAIMS WERE PROPERLY BEFORE THE COURT, THEY WOULD NOT MERIT REVIEW

It is axiomatic that the Supreme Court does not review a case from a state's highest court unless the case raises important federal issues. As one could expect in a very complex and probably unique state-law property case, Petitioners have not met that standard here. To the extent that they have identified any federal issues at all, they have failed utterly to show that these are issues warranting the attention of this Court.

Petitioners' first argument—that the judgment below was improperly phrased so as to deprive the United States of its interest in oil still in the ground—is erroneous and obviously fact-specific. The significance of the issue is further diminished by the fact that the United States, as a

non-party, would not be bound by the judgment in any event.

As for the second argument—that the decision below contravenes the authority of the Secretary of the Interior to approve or disapprove transfers of interests in federal mineral leases—Petitioners have cited no conflict with the decisions of any other court. The reason, as we have already suggested, is that it is universally recognized that courts should first adjudicate ownership disputes among private parties over rights in federal mineral leases, leaving it to the Secretary thereafter to approve any transfers necessary to effectuate the judgment.[12]

It is difficult to imagine a more fact-specific argument than Petitioners' due process claim, which amounts to the suggestion that a series of state-law errors by the New Mexico Supreme Court, taken together, constituted a deprivation of due process. Even if this Court were to rule in Petitioners' favor on that contention, its decision would have no application to any other subsequent case because the facts presented here will almost certainly never be replicated.

III. THE NEW MEXICO SUPREME COURT'S DECISION ON THE MERITS WAS CORRECT

A. The Trial Court's Judgment Did Not Affect The United States' Ownership Interest In The Land Or Minerals.

Petitioners assert that the New Mexico Supreme Court's decision applying state law divested the United States of its title to and rights in the minerals under the leasehold estate. Petitioners misconstrue and distort the effect of the New Mexico Supreme Court's holding that the PWG Group owned the lessee's interests in the subject leases. The New Mexico courts merely adjudicated the rights of the private parties before them. It is beyond dispute that

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[12] *Wallis*, 384 U.S. at 68-71.

conflicts of this nature are resolved under state law.[13] Thus, contrary to Petitioners' assertions that the New Mexico Supreme Court contravened federal law, the New Mexico Supreme Court did nothing to "divest the United States of its title to the minerals."[14] In an attempt to create the illusion of a federal issue, Petitioners obscure the determinative difference between the United States' *fee interest* in federal land and *lessee interests* obtained from the United States to develop the minerals under the fee estate. There is nothing unusual about a state court adjudicating private parties' competing claims to interests in federal oil and gas leases.

The United States, which was not a party to the case below, certainly would be surprised to learn of Petitioners' contention that the trial court's judgment "divests the title of the United States to the underlying deposits of oil in federal lands."[15] The objective intent and only conceivable effect of the New Mexico Supreme Court's judgment was to quiet title to the leasehold interests and repurchase option of the PWG Group *vis-a-vis* Petitioners.

The judgment recites in pertinent part that the PWG Group:

> have lawful possession and since 1973 have had and continue to enjoy perfect and full legal title to *all Seller's interests in GLA-59*, including but not limited to the option to repurchase mentioned in Article VII, Sec. 2 therein, applicable to the leases hereinafter in this decretal clause recited, and to the oil and liquid hydrocarbons in and that may be extracted from such leases: SF 079380, SF 079381, SF 079382, SF 079383, SF 080713B, SF 080714A, NM 012292, SF 0792002, NM 012735, and SF 079012.[16]

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[13] *Wallis*, 384 U.S. at 68-71.

[14] *See* Petition at 13.

[15] *See* Petition at 13.

[16] *See* Petition Appendix at D 3-4 (emphasis added).

The judgment is limited by its own terms to the lessee estate, *i.e.*, "Seller's interests in GLA-59." The trial court did not quiet the title of PWG against the United States or the world or otherwise affect the federal fee interest; it only provided that:

> The foregoing title of (the PWG Group) *in and to all Seller's interests in GLA-59*, enumerated in Decretal Clause No. 1 above, be, and the same hereby is, forever quieted and set at rest against the claims, demands and pretensions of defendant Roseline Abraham, [and the other parties to the litigation]; and of all persons claiming or to claim from or through them, or any of them.[17]

The United States' fee or reversionary interest in the leases simply was not affected by the judgment.

In sum, the New Mexico courts did nothing to deprive the United States of its property rights in or title to the fee interest in the leased land. Under the New Mexico Supreme Court's decision, the United States retained all of its fee interest, while based on the facts of the case and the proper application of state law, the New Mexico courts determined that PWG owned the lessee interests in the GLA-59 leases over the claims of Petitioners.

B. Private Ownership Disputes Concerning Interests In Federal Oil And Gas Leases Are Resolved Under State Law And Raise No Federal Question.

Federal law does not preempt state law as the rule of decision for determining competing claims to ownership of lessee interests under federal leases. In *Wallis v. Pan American Petroleum Corp.*,[18] this Court rejected a contention that federal common law must be applied over state law to determine competing claims to ownership of interests in federal oil and gas leases. The Court concluded:

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[17] *Id.* at D 6-7 (emphasis added).

[18] 384 U.S. at 68-69.

> We find nothing in the Mineral Leasing Act of 1920 expressing policies inconsistent with state law in the area that concerns us here.
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> * * * *
>
> The Secretary [of the Interior], who must approve all assignments before the lease obligations or record titles are shifted finally, is entirely free to disapprove assignees however valid their assignments may otherwise be.[19]

Wallis, like the case at bar, involved a dispute by which a party claimed ownership of a federal lease under an option agreement. Significantly, the Court noted that where there is a private dispute as to the validity or effect of an assignment, the Secretary of the Interior does not decide the question but will simply take no action until the parties settle their dispute in court.[20] That is all that has happened here: a state court resolved a private dispute regarding ownership of interests in federal oil and gas leases by the proper application of state law. As the Court held in *Wallis*, no federal interest is contravened by the application of state law to determine the ownership interests in federal oil and gas leases.[21]

Under the Mineral Leasing Act of 1920 (the "Act"), 41 Stat. 437, 30 U.S.C. § 181 *et seq.*, the United States expressly reserves its ownership of and rights in federal land leased for oil and gas exploration.[22] Private parties may obtain a lease from the federal government to extract

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[19] *Id.* at 69-70.

[20] *Id.* at 70 n.8.

[21] *Id.* at 70-71. *See also O'Kane v. Walker*, 561 F.2d 207, 211 (10th Cir. 1977) (New Mexico rather than federal law controls in disputes over ownership of federal oil and gas lease).

[22] *Boesche v. Udall*, 373 U.S. 472, 477-78 (1963) ("Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continued supervision by the Secretary [of the Interior].").

the minerals under the fee estate. These parties also may alienate their lessee interests freely without prior federal approval as long as they comply with the requirements of the Act and the implementing regulations.[23]

The federal scheme fully accommodates the transfer of lessee interests such as those at issue here. The only requirement to transfer the lessee interests in a federal oil and gas lease is that the parties must complete an approved form.[24] The only other conditions of transfer are terms and conditions specified in the federal lease. Thus, the transfer of lessee interests in the GLA-59 leases by Mike and Roseline Abraham and their successors-in-interest did not require prior federal approval and did not otherwise raise any federal issues. Such transfers affect only the lessee interests; they have no effect on the federal government's fee interest. After approval of the transfer, the transferee is responsible for the performance of all lease obligations, but the approval of the transfer takes effect the first day of the month in which the form is filed.[25]

To recognize Petitioners' federal claim would require the Court to overrule *Wallis* and hold that the United States is an indispensable party in every case involving disputes between private parties over interests in federal oil and gas leases.[26] To the contrary, the Department of the Interior has indicated time and time again that "it will not take sides in private disputes" and that matters pertaining to such disputes fall outside of the proper role of

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[23] *See* 43 C.F.R. § 3106.1 ("Leases may be transferred by assignment or sublease as to all or part of the acreage in the lease or as to either a divided or undivided interest therein.").

[24] *See* 43 C.F.R. § 3106.4-1 ("Each transfer of record title or of an operating right (sublease) shall be filed with the proper BLM office on current form approved by the Director . . . .").

[25] *See* 43 C.F.R. §§ 3106.7-2, 3106.7-4.

[26] In the New Mexico courts, Petitioners argued for application of Texas law and against application of the Act on the ownership issues. *See* Petition Appendix at A 18-34.

the Interior Department in administering the lease.[27] Given the Department of the Interior's long-standing policy of disclaiming any interest in private ownership disputes, the United States is not a necessary party and there is no federal question implicated by such disputes.[28]

When an ownership dispute arises and is eventually resolved in the courts, the Department of the Interior, applying the statutory criteria, is free to disapprove any resulting assignment.[29] Thus, the federal interest is fully protected in the event of ownership disputes under state law.

In *Wallis*, this Court determined that there is no conflict with state law and no significant threat to any identifiable federal policy or interest to justify the creation of federal common law to determine competing claims to ownership of interests in federal oil and gas leases. The statutory recognition of various rights and obligations in the lessee of record referred to by Petitioners[30] simply reinforces the leasehold covenants and ensures that the United States has a party to whom it can look to enforce

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[27] *See Spectrum Oil & Gas Co.*, 73 I.B.L.A. 162, 163, GFS (O&G) 183 (1983); *William B. Brice*, 53 I.B.L.A. 174, 177, GFS (O&G) 63 (1981) ("[T]he proper forum to resolve controversies regarding oil and gas lease assignments is a court of competent jurisdiction."); *see also Tom Bolack, GFS* (O&G) 50-1063-30 (1963) (Interior Department policy gives recognition to judicial determination as to the rights of parties under federal leases).

[28] *See Chuska Energy Co. v. Mobil Exploration & Producing Inc.*, 854 F.2d 727, 730 (5th Cir. 1988) (defendant cannot remove suit for breach of an assignment of operating agreement covering leases on Indian land). If Respondents or Petitioners had attempted to initiate an administrative proceeding with the Department of the Interior, they would have been directed to resolve their disputes or initiate litigation, with the Department abiding by the results of the litigation. *See O'Kane*, 561 F.2d at 210 (describing order of Interior Board of Land Appeals in the case).

[29] *See Wallis*, 384 U.S. at 70. *See also* 30 U.S.C. § 184.

[30] *See* Petition at 21-26.

those covenants and federal statutory obligations.[31] Petitioners' federal claim, therefore, does not merit the Court's attention.[32]

C. Petitioners' Due Process Claims Are Not Supported By The Record.

The gravamen of Petitioners' due process claims is that the New Mexico courts deprived Roseline Abraham of her constitutional rights because the trial court based its decision on the doctrine of presumed grant in violation of New Mexico pleading requirements and without giving Petitioners notice that the trial court was applying the doctrine. Petitioners' assertions clearly are contrary to the evidence adduced below.

Doubtless Roseline Abraham and her husband Mike Abraham conveyed all of their interest in six of ten leases involved in this case.[33] Among its alternative grounds for

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[31] *See* 30 U.S.C. § 187(a).

[32] Petitioners also ambiguously contend that the judgment of the New Mexico Supreme Court ousts the Unit Operator in connection with the GLA-59 leases, or otherwise interferes with exclusive possession by the Unit Operator, and that this creates a federal issue. Petition at 18-22. Petitioners are wrong. The recognition of PWG's ownership interests over Petitioners' claims did not effect a change in the operator of the properties, as Petitioners seem to suggest. A unit operating agreement is commonly intended to permit operators or pipeline companies to enter into contracts with a number of lessees sufficient to justify operations on an efficient scale. *See* 43 C.F.R. § 3105.3-2. "Unit Operator" is "the person authorized under the agreement approved by the Department of the Interior to conduct operations within the unit." 43 C.F.R. § 3100.0-5(b).

[33] Of the ten GLA-59 federal oil and gas leases whose ownership was in question, six were conveyed to Rincon Oil & Gas Corporation by an instrument executed by both Mike Abraham and Roseline Abraham on June 3, 1963. Because the trial court and the New Mexico Supreme Court concluded that the option to repurchase was assignable (Petition Appendix at A 18-19), the option to repurchase passed by an express, recorded grant joined by Roseline Abraham as to six leases. Petitioners neglect wholly to mention that the conveyance of June 3, 1963 was made in furtherance of a

decision, the trial court held that the May 29, 1963 agreement was a specifically enforceable contract executed by Roseline Abraham and that PWG owned the leases omitted from the June 3, 1963 conveyance by application of the doctrine of equitable conversion.[34] The New Mexico Supreme Court, however, decided it need not rely on the doctrine of equitable conversion resulting from the May 29, 1963 agreement because the lower court correctly applied the doctrine of presumed grant.[35] Application of the doctrine of presumed grant was an alternative state law basis to equitable conversion for curing the omission of the four leases from the June 3, 1963 conveyance that should have performed the terms of the May 29, 1963 agreement.[36]

Next, Petitioners argue that they did not have notice that the New Mexico courts would consider applying the doctrine of presumed grant to vest title in the PWG Group.

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written agreement of May 29, 1963, in which Mike Abraham and Roseline Abraham and Mike Abraham's brother and wife agreed to transfer to Rincon all of their interest in all ten leases. Petition Appendix at A 5-8, A 12-16, A 17-18, and A 24-25.

[34] Petition Appendix at A 15-16. The trial court held in the alternative that Rincon as purchaser under the real estate contract was entitled to specific performance by way of a court-ordered grant. *Marks v. City of Tucumcari*, 93 N.M. 4, 5, 595 P.2d 1199, 1200-01 (1979); *Mesich v. Board of County Comm'rs*, 46 N.M. 412, 416, 129 P.2d 974, 976 (1942). Had the trial court not presumed a grant it would have awarded an equitable remedy that would have yielded precisely the same result.

[35] Petition Appendix at A 15-17.

[36] The same Thomas R. Hartnett, III, representing Petitioners in this proceeding was the lawyer for Mike and Roseline Abraham in the financial reorganization of their business, which entailed the May 29, 1963 agreement and the June 3, 1963 conveyance between them and their corporation, Rincon Oil & Gas Co. Petition Appendix at A 8-15. Now that same lawyer argues that he and his clients' estate should benefit from the omission of four leases from the June 3, 1963 conveyance.

Again, Petitioners' assertions are unavailing. Petitioners clearly had notice that presumed grant applied to this case. On ruling on the Abrahams' motion *in limine before* trial, the court alerted the Abrahams that PWG's ownership claim might rest on "presumption."[37] The parties proceeded to trial on that basis and only at the end of closing argument was an observation—not an objection—made by the Abrahams' counsel that the doctrine was not pleaded[38] and that PWG's trial brief on the doctrine of presumed grant was not supported by the pretrial order statement of claims. To this the trial court replied:

> The Court thinks it is. The Court discussed it at the motions hearing. There was a brief on presumption of grant, prior to the motions hearing, that the PWG defendants had submitted. The Court read it and commented on it at that point. There is a claim in the pleadings that the PWG defendants are the owners of the property, a general allegation, and that permits PWG to assert any theory justified under the facts. . . .[39]

The issue of presumed grant was effectively tried by Petitioners' consent.[40]

Moreover, Petitioners erroneously label the possession necessary for a presumed grant as "adverse." As the New

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[37] T.R. at 91, Opposition Appendix at 1a.

[38] T.R. at 2217, Opposition Appendix at 3a-4a.

[39] T.R. at 2222, Opposition Appendix at 4a-5a.

[40] *See Dale J. Bellamah Corp. v. City of Santa Fe*, 88 N.M. 288, 291, 540 P.2d 218, 221 (1975); *White v. Wayne A. Lowdermilk, Inc.*, 85 N.M. 100, 101, 509 P.2d 575, 576-77 (Ct. App. 1973). Petitioners cite dictum in *Clark v. Amoco Prod. Co.*, 794 F.2d 967 (5th Cir. 1986), and *Hunt v. McCain*, 73 S.W.2d 564 (Tex. Civ. App.—Waco 1934, *writ dism'd w.o.j.*), for the proposition that all elements of a presumed lost deed must be pleaded and proved. The New Mexico Supreme Court properly held that the dictum in *Clark v. Amoco Prod. Co.* was not controlling, and that the trial court properly raised and considered the possibility of applying the presumption of grant. Petition Appendix at A 31-32.

Mexico Supreme Court analysis correctly observed, presumed grant instead "involves the rightfulness of one's possession . . . ." [41]

The New Mexico courts reviewed the evidence that showed Mike Abraham knew at the time of his 1964 bankruptcy that the option to repurchase could ripen as early as 1964; that Mike Abraham and his attorney, Thomas Hartnett, III, accepted and acted for some twenty-six years upon the belief that all rights had been transferred to Rincon; that beginning in 1976, El Paso Natural Gas Co. began treating PWG as the owner under the GLA-59 leases and the Abrahams stood by without objection.[42] In contrast, *Love v. Eastham*,[43] the sole authority cited by Petitioners, involved an owner, Love, who moved away from the subject property and never knew of the possession and claim made by Eastham. *Love* presents a clearly different situation than here.

Petitioners cannot obfuscate the fact that Roseline Abraham had full notice of the basis of the New Mexico courts' decisions. Petitioners not only knew that the New Mexico courts thought that the doctrine of presumed grant applied to this case, by virtue of the court's ruling on the motion *in limine* (*see supra* note 37), Petitioners also argued for equitable relief from application of the doctrine, which the New Mexico courts rejected.[44] Following a full consideration of the merits, the New Mexico Supreme Court determined that ample evidence in the record existed to find that the Abrahams conveyed or as a matter of law were presumed to have conveyed *all* of their interest in the GLA-59 leases.[45]

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[41] Petition Appendix at A 32-33.

[42] Petition Appendix at A 8-13.

[43] 137 Tex. 462, 154 S.W.2d 623 (1941).

[44] Petition Appendix at A 25.

[45] Petition Appendix at A 8-10, A 34.

Finally, Petitioners make two desperate attempts to fabricate federal issues upon which they entreat the Court to grant their petition. Petitioners contend that an oil and gas leasehold is not real property and cite in support *Boesche v. Udall*, 373 U.S. 472 (1963).[46] This is a baffling misinterpretation or misrepresentation. The case says nothing of the sort.

The federal oil and gas leases that would be transferred from El Paso to the Seller upon exercise of the option in GLA-59 are real property.[47] "Since 1922, [the New Mexico Supreme Court] has consistently held that oil and gas and mineral leases are real property."[48] The federal courts have reached the same conclusion with respect to federal leases.[49]

Next, Petitioners claim both that the leases were personal property and invoke the New Mexico joinder statute, which requires that a spouse be divested of *real property* only by a written conveyance signed by her.[50] In fact, Roseline Abraham joined in the written agreement of May 29, 1963, by which she and her husband promised in writing to make the transfer to Universal Minerals (which became Rincon) and in return received $1.5 million from Chemical Bank.[51] As the trial court found, she subsequently benefitted by the discharge of this loan in bankruptcy proceedings and in the sale of Rincon stock to Chemical Bank, which sale was premised, in part, upon Mike Abraham's and attorney Hartnett's representations

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[46] Petition at 27.

[47] *Padilla v. Roller*, 94 N.M. 234, 608 P.2d 1116 (1980).

[48] *Id.*

[49] *O'Kane*, 561 F.2d at 211; *see also Pacific Enterprise Oil Co. v. Hertz*, 893 P.2d 280, 284 (10th Cir. 1990).

[50] Petition at 28 (citing N.M. Stat. Ann. § 40-3-13A. (Michie 1978)).

[51] Petition Appendix at A 4-5.

that Rincon owned all of the Seller's interests in GLA-59. On the basis of both "logic and policy" the New Mexico courts applied a rule of property law, presumed grant, against both spouses because it followed from the evidence and served to protect those who have held long possession of property with the acquiescence of the record owners.[52]

Petitioners also mix in the notion that Rincon was purportedly "satisfied" by the Abrahams' performance of the May 29, 1963 agreement, suggesting that such satisfaction somehow would preclude successor claims under the agreement. Petitioners cite one authority, *Williams v. Eggleston*,[53] in support of this proposition.[54] The issue in *Williams* was whether a third party would be allowed to interject itself into a contract dispute.[55] The Supreme Court noted that, unless the third party had an interest in the contract, it would not be allowed to become part of the litigation.[56] Petitioners quote from *Williams* out of context to support an argument that completely ignores that PWG had an interest in those transactions.

Petitioners attempt to use the "satisfaction" theory from a passage lifted from *Williams* to tout the allegedly "uncontradicted testimony" of W. H. Hudson "that he, and Rincon, were satisfied with the performance of the Agreement to Convey by the Abrahams."[57] Actually, Mr. Hudson's testimony was very equivocal. When directly asked whether the GLA-59 option was to be part of the Rincon conveyance in the 1963 transaction, Mr. Hudson

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[52] Petition Appendix at A 25-26.

[53] 170 U.S. 304 (1898).

[54] Petition at 30-31.

[55] 170 U.S. at 309.

[56] *Id.* ("The town is, therefore, an entire stranger to the contract . . . .").

[57] Petition at 30.

could not remember.[58] The witness was attempting to resurrect events twenty-five years past, while most of the compelling evidence in the trial court consisted of undisputed documents executed contemporaneously with the events in question.

This case turns solely upon an analysis of the particular facts involved. The Court should not grant certiorari to review the factual findings of the lower courts.[59] In the present case, the trial court found that Mike and Roseline Abraham had transferred all of their interest in the subject leaseholds. The New Mexico Supreme Court affirmed these findings of fact and the application of New Mexico law. This Court should not reexamine the New Mexico courts' findings of fact or conclusions of fact.[60]

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[58] T.R. at 1400-01, Opposition Appendix at 1a-3a.

[59] *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). *See also Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

[60] *See Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

CONCLUSION

This is not the case as described in Petitioners' opening paragraph of their Statement of the Case. In this case, the New Mexico courts correctly applied state law to resolve a dispute over the ownership of lessee interests in federal oil and gas leases without affecting any fee interest of the United States. This case presents no federal issue for this Court's consideration. The Court should therefore deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: May 18, 1994

APPENDIX A

EXCERPTS FROM THE TRANSCRIPT OF RECORD IN *EL PASO PRODUCTION COMPANY v. PWG PARTNERSHIP*, CV-89-822.

T.R. 91;

They couldn't create such a right. Thank you, sir.

THE COURT: Thank you very much, Mr. Harnett. The Court having heard argument of counsel would conclude that, first, the PWG defendants do have pleadings to support their claims of ownership. The last pleading that was filed by PWG was limited by court order to answering the additional claims or defenses made by "interlineation," so-called, by El Paso. There's no question that PWG claims it owns the property here by virtue of conveyances having been made to it, by virtue of other theories that have been mentioned, by presumption, and so on. So the Court will deny that portion of the motion in limine, asking the Court to determine that the PWG defendants have no pleadings to support their claims of ownership. The Court also would say that these claims of ownership are repeated in the pretrial order, which was approved by Judge Onuska, and this was in January, I believe, 1991.

Mr. Harnett, the Court is sympathetic with you in this respect: This Court, in holding pretrial—this Court, in its pretrial procedure, would require the attorneys to set forth certain statements of their claims factually, legal theories, many other things. But the Court would require a pretrial conferencen [sic] to be had, in which the Court participated; and the Court would require that the pretrial order be made by it, the Court; and the Court would nail all the attorneys down to the general nature of the facts they intended to try to elicit, and the legal theories supporting those facts; and the Court would require the attorneys to

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T.R. 1400;

seen instruments reflecting it, so now I'm aware of it. I don't think I thought they had any value at the time, in any event, and it would not have been the intent that those properties—there was never any discussion regarding an option to purchase to go into these properties. It was all properties, and I really—and even today have trouble saying that an option to purchase is an effecting—although I guess it probably is—

THE COURT: Excuse me, Mr. Harnett. That an option to purchase is—what?

MR. JAY HARNETT: "Is an effecting;" that's just what the witness says, Your Honor.

THE COURT: OK; all right.

A. —although I guess it probably is, in legal terms, is not a title interest, it's not a property interest. It's an option to purchase title; and if it was discussed, it was either agreed to pay no attention to it, and it was not my understanding that it would be in here. If it was an option to purchase—now, that's different from what I understood, a carried working interest.

Q. And so I need to understand, then, is it your testimony that you do remember discussion that there existed an option, or are you simply saying that if there had existed, it would not have been important to your deal?

A. I guess I'm saying, I can't say for sure whether I ever heard of it or not. If I had heard of it, I would not have considered it material.

* * * *

T.R. 1401;

Q. Would you please restate your reasons why it would not have been material?

A. I didn't think it had any value, de minimum value.

Q. Do you remember any discussions, any specific discussions, about that particular option, at any time before today?

A. Not specifically. As I corrected my prior testimony, I sort of vaguely do recall, either there was an option, or I was aware of it, but it was not part of these negotiations or title transfers.

Q. When you put a price upon the option that you granted to Mike Abraham for the purchase of your 200,000 shares of Rincon, were you aware of the existence of an option to repurchase?

A. I'll repeat that: If I were aware of it, which I could have been, I didn't give any value to it, or no part of that number reflected as to a value of an option to repurchase.

MR. JOLLEY: Page 117, line 8, through page 118, line 7; commencing page 120, line 3 through 6. This is a question by Mr. Slade.

REDIRECT EXAMINATION

BY MR. SLADE:

Q. And on redirect examination—cross-examination, Mr. Briones mentioned your affidavit, and asked whether you still stood by all the statements in the affidavit. I just wanted to check on one or two points on that.

A. Certainly.

* * * *

T.R. 2217;

be for the day, if you have a dispute, you're not supposed to go out and shoot each other, beat each other up; you're supposed to go to the courthouse; and I think the Abrahams had every right, under the facts of this case—never hearing from El Paso that their rights were ready to pay some money, never heard that, and they put their faith in El Paso, that El Paso would do what it said it would do, but it didn't. They also had the right to assume that an interloper would not wrongly interfer with their contract, which was exactly what was done in this case; and it would just be a great injustice, in my opinion, for an in-

terloper to be able to take the rights away—the contractual rights, something sacred, away from the Abrahams, when they had nothing to do with it, or misleading them, or anything else.

By the way, there's no pleading—there's no pleading of the PWG on this user-possession claim. It's not in the pretrial order. El Paso Natural Gas Company has it in their contentions on GLA-59. So there is no evidence of it, either, except a little bit on the liquid hydrocarbons, but certainly not on the option to repurchase. Thank you.

THE COURT: Thank you very much, Mr. Hartnett. The Court appreciates your argument, understands your position very clearly at this point. Why don't we take about a seven- or eight-minute recess, and try to start again about quarter of 11:00? I'd like to have a chance to look over this brief, before we start with Mr. Gallegos.

* * * *

T.R. 2222;

hadn't occurred, and there could not have been a material breach of the debtor's obligation, assuming arguendo that the debtor, Mike Abraham, had any obligation under a true option. Therefore, there would not have—the GLA-59 option would not have been an executory contract, as of the time of Mike Abraham's bankruptcy.

THE COURT: Thank you very kindly, Mr. Oja. The Court appreciates that.

MR. HARTNETT: Your Honor, may I make an objection?

THE COURT: Yes, Mr. Hartnett. What is your objection, please? Why don't you take the lectern, if you would?

MR. HARTNETT: Your Honor, I object to the PWG defendants' Trial Brief No. 8, the doctrine of presumption of grant. I was just furnished that, just prior to my argument, and now I've had a look at it, and this

is not supported by the contentions of PWG in the pre-trial order.

THE COURT: The Court thinks it is. The Court discussed it at the motions hearing. There was a brief on presumption of grant, prior to the motions hearing, that the PWG defendants had submitted. The Court read it and commented on it at that point. There is a claim in the pleadings that the PWG defendants are the owners of the property, a general allegation, and that permits PWG to assert any theory justified under the facts, and also the very first objection made by you, Mr. Hartnett, on Tuesday, the beginning of the actual trial on the merits between the two parties here, the Court overruled your objection on the ground that the

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(3) No. 93-1704

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVE J. ABRAHAM, Personal Representative of the Estate of Roseline Abraham, et al.,

Petitioners,

v.

PWG PARTNERSHIP, et al,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Mexico

PETITIONER'S REPLY BRIEF TO BRIEF OF RESPONDENTS IN OPPOSITION

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Dated: May 28, 1994

15 pp

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REASONS FOR GRANTING THE WRIT

Contrary to the assertions of Respondents, this is not a preemption case. This is a case that involves the exclusive

power of Congress to control the occupancy and use of property owned by the United States, and the infringement by New Mexico courts upon that exclusive power.

State laws granting title by adverse possession, prescription, or presumed grant can never apply to oil and gas leases issued by the United States, because such legal remedies are based on possession by an intruder, which necessarily conflicts with the exclusive control of possession by the United States.

"Because of the importance of the contention that the state court's decision had invaded the domain of the Federal Communications Commission we granted certiorari . . ." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 123 (1945). Also see, Howlett v. Rose, 496 U.S. 356 (1990),

Testa v. Katt, 330 U.S. 386 (1947), and Martinez v. California, 444 U.S. 277 (1980).

Because the doctrine of presumed grant is predicated on a finding of exclusive possession by an intruder, the courts of New Mexico necessarily usurped the exclusive power of Congress by ruling that a party never authorized by the federal government had exclusive possession and acquired rights thereby.

No court, federal or state, has any power to interfere with the exclusive power of Congress. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Kleppe v. New Mexico, 426 U.S. 529, 540 (1976); Boesche v. Udall, 373 U.S. 472, 477-78 (1963). This is analogous to the exclusive right of Indians to occupancy and use, granted to them by the United States, which can only be interfered with, or

terminated by, the United States. Oneida Indian Nation v. Oneida County, 414 U.S. 661 (1974) (right of possession not terminable except by act of the United States)

The United States owns millions of acres of oil and gas, mostly in remote, isolated areas. American Indians own thousands more which the U.S. administers and protects. A state's doctrine of presumed grant, prescription, or adverse possession threatens the exclusive federal power to control the occupancy and use of federal lands. Respondents' sidebar that certiorari should not be granted because this is "a complex and probably unique state-law property case," allegedly never to arise again, is naive. The New Mexico decision is an invitation to squatters on federal lands all over the country.

Respondents Misstate Petitioners' Second Reason

Respondents misconstrue a contention of Petitioners: "At most, what Petitioners are saying is that federal law preempts one particular aspect of state property law." (p.6)

Petitioners contend that state laws governing adverse possession, prescription, and presumed grant can never be applied to federal oil and gas leases because such doctrines are grounded in exclusive possession[1]. Exclusive possession by an unauthorized party impermissibly interferes with, and threatens, the exclusive control of the United States.

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[1] And would threaten the exclusive power of the United States to control the occupancy and use of property of the United States.

This is not a case of competing transferees for ownership of rights under oil and gas leases (as asserted by Respondents). Those claims are clearly decided by state law. Wallis v. Pan American Petroleum Corp. 384 U.S. 63 (1963). One can illustrate Petitioners' argument by juxtaposing their case with the issue involved in O'Kane v. Walker, 561 F.2d 207 (10th Cir. 1977). In that case, Mr. Walker became the record owner of an oil and gas lease. He assigned the lease to X. Later, he also assigned the lease to Y. The issue was notice, and bona fide purchaser. The case was decided according to New Mexico law (as required by Wallis).

The case at bar does not involve competing assignments.[2] The court below

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[2] Respondents seem to imply that Mike and Roseline Abraham assigned 10 leases. The reason the courts below

found a presumed grant of undocumented alleged transfers based on exclusive possession by an unauthorized party of minerals owned by the United States, (1) the occupancy and use of which are under the exclusive control of the United States, (2) exclusive possession of which was granted by

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contrived the doctrine of presumed grant was to pick up 4 leases that were never assigned. (App. A-15)*

*(Also (in footnote 3 pp 2-3 ** and ***), Respondents misstate the record and the law: the stipulated maturity date was represented to, and accepted by the court, in the contested accounting phase trial, with no strings attached (Tr. 2659-60 and 2667).

**Respondents are less than candid in advancing the Kansas Maguire case because it is directly contrary to (1) Lantis v. Cook, 69 N.W.2d 849 (Mich. 1955), and (2) the Restatement, Contracts 2D § 301. The New Mexico Supreme Court denied such contention of Respondents when it denied their motions to dismiss the appeal (on that ground.)

*** Roseline Abraham appeared at the trial in July, 1991.

the United States to the lessee (subject to being supplanted if unitized), and (3) exclusive possession of which was placed in a unit operator upon unitization.

Denial of Due Process

Roseline Abraham was denied due process by the New Mexico courts. First, the state courts ignored her contractual rights. She had a right to rely on her contract which required her to do nothing until El Paso Natural Gas Company (a) billed her for above ground separators if liquid hydrocarbons were extracted, (b) notified her if oil was encountered, and (c) notified her when her option to repurchase matured. None of that happened. Yet, the New Mexico courts found acquiescence.

Second, the state courts ignored federal law. She had a right to rely on federal law which grants exclusive

possession to federal oil and gas lesses, and unit operators, yet the New Mexico courts found exclusive possession in a trespasser.

Third, the state courts ignored New Mexico statutory law. As a resident of New Mexico, she had a right to rely on New Mexico statutes that provide that a conveyance of her community real property without her signature is null and void.[3] Yet the New Mexico courts ignored the fact that she did not sign any "presumed grant."

Fourth, the state courts ignored New Mexico and federal procedural law. Due process was denied by the trial judge's contriving "presumed grant" without

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[3] In Padilla v. Roller, 608 P.2d 1116 (1980), cited by Respondents, the Supreme Court of New Mexico unequivocally ruled a conveyance without the wife's signature is null and void under New Mexico law.

pleadings. Furthermore, Roseline Abraham was repeatedly denied a jury trial, even though issues of possession, and acquiescence, are jury issues. Fletcher v. Fuller, 120 U.S. 534 (1887). In addition, if presumed grant had been plead Roseline Abraham would have removed the case to federal court where she would have received a fair trial.

The denial of due process to Roseline Abraham deprived her of an enormously valuable option which was a critical part of the consideration for her entering into the contract in 1952. As the dissent forcefully and correctly observed, the New Mexico courts awarded the extremely valuable option to a party who neither "contracted or bargained for" it (Petition App. A-56-57), nor paid anything for it.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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Dated May 28, 1994